

**United States**  
**Court of Appeals**  
for the Ninth Circuit.

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ELI B. CASTLEMAN, MARION V. CASTLEMAN, LOUIS FEUERMAN, JULIUS NOVEMBER, ELEANOR NOVEMBER, and BERNARD REICH,

Appellants,

vs.

HOWARD R. HUGHES, RKO PICTURES CORPORATION, RKO RADIO PICTURES, INC., THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, ELI B. CASTLEMAN, MARION V. CASTLEMAN and LOUIS FEUERMAN,

Appellees.

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**Transcript of Record**

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Appeal from the United States District Court for the  
Southern District of California,  
Central Division.

FILED

MAR 21 1955

PAUL P. O'BRIEN, CLERK



United States  
Court of Appeals  
for the Ninth Circuit.

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ELI B. CASTLEMAN, MARION V. CASTLE-  
MAN, LOUIS FEUERMAN, JULIUS NO-  
VEMBER, ELEANOR NOVEMBER, and  
BERNARD REICH,

Appellants,

vs.

HOWARD R. HUGHES, RKO PICTURES COR-  
PORATION, RKO RADIO PICTURES,  
INC., THE CHASE NATIONAL BANK OF  
THE CITY OF NEW YORK, ELI B.  
CASTLEMAN, MARION V. CASTLEMAN  
and LOUIS FEUERMAN,

Appellees.

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Southern District of California,  
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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## NAMES AND ADDRESSES OF ATTORNEYS

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United States District Court, Southern District of  
California, Central Division

No. 14,848-BH

ELI B. CASTLEMAN, et al.,

vs.

HOWARD R. HUGHES, et al.

MINUTES OF THE COURT—FEB. 9, 1953

Present: The Hon. Ben Harrison,  
District Judge.

Counsel for Plaintiffs: No appearance.

Counsel for Defendants: No appearance.

Proceedings: For hearing pursuant to Rule 16  
FRCP.

It Is Ordered: that cause is continued to March  
2, 1953, 10 a.m., for said hearing.

EDMUND L. SMITH,  
Clerk.

By MURRAY E. WIRE,  
Deputy Clerk. [25\*]

## MINUTES OF THE COURT—MARCH 2, 1953

Present: Hon. Ben Harrison,  
District Judge.

Counsel for Plaintiffs: Bernard Reich.

Counsel for Defendants: No appearance.

Proceedings: For hearing pursuant to Rule 16  
FRCP. (No return of Service of  
Summons.)

It Is Ordered that cause as to said hearing be  
stricken from calendar.

EDMUND L. SMITH,  
Clerk.

By MURRAY E. WIRE,  
Deputy Clerk. [26]

In the United States District Court, Southern  
District of California, Central Division

No. 14,848-BH

ELI B. CASTLEMAN and MARION V. CASTLE-  
MAN, Doing Business as WOLVERINE TEX-  
TILE COMPANY, and LOUIS FEUERMÁN,

Plaintiffs,

vs.

HOWARD R. HUGHES, RKO PICTURES COR-  
PORATION, RKO RADIO PICTURES,  
INC., and THE CHASE NATIONAL BANK  
OF THE CITY OF NEW YORK,

Defendants.

AMENDED COMPLAINT (STOCKHOLDERS'  
DERIVATIVE ACTION) FOR ACCOUNT-  
ING AND OTHER EQUITABLE RELIEF

Plaintiffs for their amended complaint against  
the defendants, upon information and belief, except  
as to Paragraphs 1, 2(a), 2(b), 2(f), 2(g) and 5  
allege:

As to All Causes of Action

1. Plaintiffs, Eli B. Castleman and Marion V. Castleman, are the beneficial owners of 2500 shares of the capital common stock of RKO Pictures Corporation (hereinafter sometimes referred to as the "Parent Company") and have been such continuously since June, 1952, and at the times of some of the transactions and acts herein complained of, and

plaintiff Louis [27] Feuerman has been a record shareholder of the Parent Company and its predecessor since September, 1931, and at the times of all of the transactions and acts herein complained of.

2. (a) Plaintiffs Eli B. Castleman and Marion V. Castleman are citizens of the State of Michigan.

(b) Plaintiff Louis Feuerman is a citizen of the State of New York.

(c) Defendant Howard R. Hughes purports to be a citizen of the State of Texas but resides in the State of California.

(d) The Parent Company was organized under the laws of the State of Delaware on November 18, 1950, in accordance with the terms of a Plan of Reorganization, hereinafter more fully described, of Radio-Keith-Orpheum Corporation (hereinafter sometimes referred to as "Old RKO").

(e) RKO Radio Pictures, Inc., was organized under the laws of the State of Delaware on June 7, 1921.

(f) The matter in controversy exceeds the sum or value of \$3,000.00, exclusive of interest and costs, and is between citizens of different states.

(g) Plaintiffs, or at least one of them, was a shareholder at the time of the transactions of which they complain.

(h) This action is not a collusive one to confer on a court of the United States jurisdiction of any

action of which it would not otherwise have jurisdiction.

3. (a) Old RKO had been a holding and not an operating company and its assets consisted principally of capital stocks and obligations of subsidiary and affiliated companies, some of which were engaged in the business of producing or distributing motion pictures and others of which were engaged in the business of exhibiting motion pictures. [28]

(b) Old RKO's principal wholly-owned subsidiaries were RKO Theatres, Inc., and RKO Radio Pictures, Inc., (the latter, hereinafter sometimes referred to as "Radio Pictures").

(c) RKO Theatres, Inc., together with its subsidiaries, owned or controlled substantially all the theatre operating assets and Radio Pictures was engaged in the production and distribution of motion pictures.

(d) The authorized capital stock of Old RKO consisted of 8,000,000 shares of common stock of the par value of \$1.00 of which approximately 3,914,913 shares were outstanding as to the date of the Plan of Reorganization.

4. (a) In antecedent litigation, entitled "United States of America vs. Paramount Pictures, Inc., et al.," and to which Old RKO was a party defendant, the government sought, among other things, separation of theatre operation from the production and distribution of motion pictures.

(b) While the antitrust litigation was pending, Atlas Corporation owned 929,020 shares of Old RKO, approximately 24% and certain option warrants, approximately 12% of Old RKO.

(c) On May 10, 1948, Atlas Corporation sold to defendant, Howard R. Hughes, said 929,020 shares of Old RKO thereby endowing Hughes with effective and complete power over and control of the business, assets and policies of Old RKO and its subsidiaries.

(d) In the exercise of said power over and control of Old RKO and its subsidiaries Hughes replaced or caused to be replaced the directors and officers of Old RKO and of its principal subsidiaries with persons subservient to him. As dominant stockholder and director of Old RKO and as managing director of production of Radio Pictures: (i) Hughes hired and fired such new personnel; (ii) fixed their salaries; [29] (iii) assigned them to various tasks; (iv) caused them to do his bidding in all matters; and (v) exercised undisputed sway over the affairs of Old RKO, directly or through his aforesaid controlled person.

(e) Thereupon, Hughes caused Old RKO to negotiate with the Department of Justice a "Consent Decree," which was entered in the action aforementioned, and which terminated, as to Old RKO said litigation and provided for the separation of the business of operating theatres from the business of producing and distributing motion pictures.

(f) A Plan of Reorganization designed to effect such separation was formulated to implement said separation of the said businesses by a transfer to one new holding company of all the theatre assets and to another new holding company of all the production and distribution assets and by an exchange of the capital stocks of each of such new holding companies, on a share for share basis, for the outstanding capital stock of Old RKO, as an incident to its dissolution.

(g) The aforesaid Consent Decree required that each new holding company be operated wholly independently of one another and have no common directors, officers, agents or employees and enjoined such companies from thereafter attempting to control or influence each other's business or operating policies.

(h) Hughes, who represented in the Consent Decree that he owned approximately 24% of Old RKO stock, was required to dispose of his stock in either the New Theatre company or the New Picture company to a purchaser who was not a defendant or affiliated with or controlled by any defendant, or to deposit such stock with a voting trustee designated by [30] the court.

(i) In compliance with the Consent Decree, Hughes notified the court that he would trustee his New Theatre company stock, subject to his right to sell the stock of either the New Companies as provided in said Consent Decree.

(j) After several extensions, the Court finally

fixed the date of consummation of the aforementioned Plan of Reorganization at not later than December 31, 1950.

(k) The separation of the two businesses, pursuant to the Plan of Reorganization, was effected as of the close of business on December 31, 1950.

(l) The production and distribution assets of Old RKO were taken over by the Parent Company, i.e., RKO Pictures Corporation, and the theatre assets were taken over by RKO Theatres Corporation and in exchange therefor these two new companies each delivered to Old RKO, 3,914,913 shares of their common stocks. Each holder of the common stock of Old RKO outstanding at the close of business on December 31, 1950, became entitled, upon surrender of his certificate, to receive one share of the common stock in each of the new companies for each share of Old RKO common stock surrendered.

(m) Hughes received 929,020 shares of New Theatre company stock (which he trusteeed pursuant to the Consent Decree) and 929,020 shares of the New Picture company, i.e., the defendant RKO Pictures Corporation, (The Parent Company). Since said date, Hughes increased his holdings of the common stock of the Parent Company until they amounted to 1,013,420 or approximately 30% of its outstanding stock and continued to dominate its affairs in the manner referred to in paragraph 4(d), *supra*. [31]

(n) In addition, Hughes took the title and posi-

tion of "Managing Director - Production" and exercised the powers inherent therein not on Radio Pictures premises but from an office on the property of Samuel Goldwyn.

(o) The stock of the Parent Company is traded upon the New York Stock Exchange. It is held by approximately 16,000 holders who reside in every state of the United States and in foreign countries.

(p) The Chase National Bank of the City of New York is the stock transfer agent for the common stock of the Parent Company and is merely a nominal party defendant against which plaintiffs seek no affirmative relief.

5. Plaintiffs bring this action derivatively on behalf of the Parent Company and on behalf of Radio Pictures, which is a wholly-owned subsidiary of the Parent Company, on their own behalf and on behalf of all other stockholders of the Parent Company similarly situated who may come in and contribute to the cost of prosecuting the within action.

6. Since January 1, 1951, the Parent Company and its subsidiaries, including Radio Pictures have carried on the picture producing and distributing business of Old RKO under the Hughes regime.

#### As and for a First Cause of Action

7. At the times herein mentioned between May, 1948, when Hughes first acquired his stock holdings in Old RKO, until September 24, 1952, when he sold

said stockholdings, the directors and officers thereof and of RKO Pictures Corporation were:

Ned E. Depinet . . . . .	Director, President
Noah Dietrich . . . . .	Director [32]
Frederick L. Ehrman . . . . .	Director
L. Lawrence Green . . . . .	Director
Howard R. Hughes . . . . .	Director
George H. Shaw . . . . .	Director
J. Miller Walker . . . . .	Director
Malcolm Kingsberg . . . . .	Vice-President
Floyd B. Odum . . . . .	Chairman of Board
N. Peter Rathvon . . . . .	Director
Francis J. O'Hara, Jr. . . . .	Director

8. At the times herein mentioned and continuing to September 24, 1952, the officers and directors of Old RKO and the Parent Company utterly failed and neglected to perform their official duties as directors and officers; mismanaged the affairs of Old RKO and the Parent Company and did not administer the affairs of said constituent companies in an efficient, careful or prudent manner but on the contrary they negligently suffered and permitted money and assets of said companies to be wasted and dissipated and surrendered their independence and judgments to Howard Hughes, placed themselves in positions of divided loyalties in cases where the interests of RKO were in conflict with those of Hughes' owned or controlled companies in contractual relations between them in all of which they aided, abetted and assisted Hughes to the loss, damage and detriment of Old RKO and the Parent Company and to the profit,

gain and advantage of Hughes and his owned or controlled private enterprises.

9. (a) Prior to his acquisition of the Old RKO stock and continuing to date, Hughes has been connected with Hughes Tool Company of Texas, a multimillion dollar enterprise which manufactures oil-well tools, has an aircraft division and a motion picture division. In addition, Hughes had been [33] engaged in building a huge flying boat (title to which is in the Reconstruction Finance Corporation).

(b) Moreover, as a pilot and aviation enthusiast Hughes frequently engaged in speed trials and personally handled the controls of his experimental planes and devotes considerable of his time to these exploits.

10. (a) When Hughes took over the Atlas holdings in Old RKO he continued to carry on his multifarious activities and though he took the title "Managing Director - Production," failed to come on to the RKO studio lot and maintained his office on the Samuel Goldwyn lot, a mile away.

(b) Hughes interfered in the production activities of the RKO Radio Pictures subsidiary of which Dore Schary was then production chief. He caused the cancellation of four or more scheduled feature productions on one of which the sets had already been built. He caused Dore Schary to leave RKO and without setting foot on the lot, relegated operation of the motion picture subsidiary to a three-man

interim executive committee consisting of persons who were not directors of Old RKO and who had never been elected by RKO's stockholders.

(c) On or about August 18, 1948, Hughes caused Radio Pictures improvidently to purchase from himself (through Hughes Tool Company) certain motion picture assets consisting of distribution rights on one completed feature picture, reissue and remake rights on ten additional completed feature pictures, certain motion picture stories and scripts, personal service contracts with three artists; certain motion picture production equipment, stock film, music rights and motion picture titles.

(d) In order to give an appearance of arm's length bargaining and to becloud the fact that Hughes was [34] sitting on both sides of the negotiating table, the contract of sale contained references to the required payment of a "fair price" but negated the effect thereof by subjecting the same to the required approval by respective boards of directors of both companies.

(e) Hughes caused advances to be made to outside producers running to many millions of dollars under terms which provided for recovery only from the proceeds of distribution of said productions. Said advances were made with reckless abandon at Hughes' direction and resulted in losses during the times hereinmentioned of upwards of one million dollars per year. The amount of \$1,296,000 is set forth as the amount of unrecoverable advances in the Parent Company's latest balance sheet.

(f) Hughes conducted the affairs of the defendants RKO as if he owned and controlled all of their outstanding stock and as his private business.

(g) Hughes disregarded and ignored his duties as a director of said defendants by failing to attend meetings of the Board of Directors, except on rare occasions.

(h) Hughes failed to administer the affairs of the said defendants in an efficient, careful, prudent or businesslike manner; but on the contrary (i) recklessly and negligently suffered and permitted money and assets of the said defendants to be squandered, wasted and dissipated; (ii) was unavailable and delayed approval to both major and minor details which he himself ordered must await his approval, and (iii) interfered with normal and regular production schedules and increased production costs, and also laid off and fired key personnel and virtually closed down the studio, all pursuant to arbitrary, reckless, negligent and erratic behavior, [35] actions and decisions, and because of personal pique, whim and caprice.

(i) In the instance of the motion picture *The Robe*, Hughes interfered and prevented its production because he was not interested in religious pictures. Subsequently, and within the past two years, pursuant to settlement, the picture company assigned and transferred its rights to produce and distribute the picture to Twentieth Century-Fox Film Corporation, at a loss and damage to the said

defendants of its investment and prospective profits of some two or more million dollars.

(j) Hughes has used the funds and property of the said defendants for his own personal purposes, uses and benefit, and to the detriment, disadvantage and damage of the said defendants.

(k) Hughes directly and indirectly favored and benefited third persons out of funds, assets and property of the said defendants for favors, benefits and advantages rendered to him personally by said third persons.

(l) Hughes has caused the said defendants to employ or contract with artists, groups and companies of artists, and other personnel at great expense, the services of which artists, groups and companies of artists and other personnel were not actually utilized, or so infrequently utilized as to unnecessarily and improperly cost and damage said defendants by hundreds of thousands of dollars.

(m) Hughes, in connection with artists under contract to him personally or to the said companies owned and/or controlled by him, dealt with himself to the loss, damage and detriment of the said defendants and to the profit, gain and advantage of Hughes and his said owned or controlled companies.

(n) Hughes caused the said defendants to build up and expend substantial sums of money on artists under contract [36] to him personally or to companies owned and/or controlled by him outside of

RKO Enterprises, to the loss, damage and detriment of the said defendants.

(o) Hughes arbitrarily and out of personal pique, caprice and whim caused the said defendants to breach contracts with third persons and companies and/or assert unmeritorious claims and defenses against such third persons and companies at an unnecessary cost to the picture company of hundreds of thousands of dollars.

(p) Hughes caused said defendants to purchase assets, real and personal, of dubious, little or no value from artists at substantial cost to the said defendants in order to induce said artists to contract with the said defendants and at salaries and emoluments not reflecting the true cost to the said defendants, to their loss, damage and detriment.

11. By reason of the foregoing Radio Pictures and the Parent Company have sustained loss and damage and Hughes and his private enterprises have profited, in exact amounts unknown to plaintiffs, and which can be ascertained only upon an accounting in this action. Moreover, some of the acts and transactions herein alleged, constituting dealings between controlling shareholders and their nominee-directors and officers on the one hand, with their cestui que trust companies, on the other, require the scrutiny by and intervention of this Court of equity to compel an accounting with respect thereto.

12. Plaintiffs have no adequate remedy at law.

## As and for a Second Cause of Action

13. Plaintiffs repeat and reallege paragraphs "1" through "12" hereof. [37]

14. (a) The Parent Company and subsidiary companies according to its last published consolidated balance sheet had indicated total assets of \$52,540,408.

(b) Its inventories, which include released productions, at cost, less amortization; completed productions, not released, at cost; productions in progress and charges to future productions, at cost, supplies, story rights and continuities were carried at close to \$30,000,000.

(c) Film rentals and sales, as last reported in the Parent Company's profit and loss statement provided a revenue of \$57,000,000 before expenses.

(d) The Parent Company in the name of Radio Pictures owns certain motion picture producing studios located in Los Angeles and Culver City, California, comprising 28.5 acres, containing 26 stages having approximately 328,000 square feet of floor space, as well as many varied buildings used for the storage of equipment and maintenance facilities and for general offices. Also two tracts of land in Culver City (one adjacent to the Culver City studio) comprising approximately 88 acres. Of the land adjacent to the studio 28 acres are used principally for the production of exterior scenes in motion pictures, the balance being vacant. Another tract of land in the Encino section of Los Angeles, comprising ap-

proximately 89 acres, is used mainly for the production of exterior scenes in motion pictures.

(e) Radio Pictures maintains 32 film exchanges in principal cities of the United States and Canada for the sale and distribution of motion pictures.

(f) Radio Pictures distributes feature and short subject motion pictures produced by others, such as those by Samuel Goldwyn and Walt Disney. [38]

(g) Over the years there had accumulated in the Radio Pictures library approximately 600 feature pictures which in addition to the residual value inherent therein, absent television, had an enormous value to the Parent Company because of their potential use as television material.

15. (a) Just prior to June 4th, 1952, the date of the Annual Meeting of Stockholders of the Parent Company, the Board of Directors of the Parent Company consisted of the following persons:

Howard R. Hughes

Ned Depinet

Noah Dietrich

Francis J. O'Hara

J. Miller Walker.

(b) Said Board of Directors, in about May, 1952, authorized the preparation, assembling and mailing of a "proxy statement" to accompany a notice of annual meeting to be held on June 4, 1952, in connection with a solicitation of proxies from the Parent Company stockholders for use at said annual meeting.

(c) With respect to the item regarding the election of directors, it was proposed in the proxy statement “ \* \* \* that five directors of the Corporation shall be elected at the Meeting to serve in accordance with the bylaws. \* \* \*” There then followed the statement that “Under the bylaws, directors are to be elected at each Annual Meeting of the Stockholders to hold office until their successors are respectively elected and qualify, or until they die, resign or are removed.”

(d) The solicitation of proxies by mail and through the use of professional proxy solicitors was made at [39] the expense of the Parent Company and in the light of the situation constituted a waste of corporate funds since the said cost was properly a personal cost of Hughes and his co-directors.

16. At all times herein mentioned, after negotiating the Consent Decree, Hughes had the right to sell the stock of either his new Theatre Company stock or new Picture Company stock even though he had previously elected to Trustee his Theatre Company stock, and, at or about the time of the 1952 annual meeting of the stockholders of the Parent Company, Hughes entertained preliminary negotiations looking toward a sale of his Picture Company stock.

17. No disclosure was made in the proxy soliciting material that while Hughes and his co-directors were soliciting proxies for their election as directors of the Parent Company for the ensuing year, to hold office until their successors are respectively elected, they contemplated surrendering their directorships

should Hughes successfully consummate such negotiations, and to that extent the proxy material was misleading and in contravention of Regulation X-14 of the United States Securities and Exchange Commission promulgated under Section 14 of the Securities and Exchange Act of 1934.

18. Hughes or persons acting on his behalf and a group of persons consisting of Ralph E. Stolkin, A. L. Koolish, Sherrill Corwin, Raymond Ryan and Edward Burke (hereinafter sometimes referred to as the "Chicago Syndicate") engaged in eight weeks of negotiations, commencing at or about the time of the 1952 annual meeting of the Parent Company stockholders for the election of directors, looking toward a transfer of control of the Parent Company and its property and effects by Hughes to the Chicago Syndicate to be achieved through a sale [40] of his Picture Company stock as a requisite, though secondary matter, upon the payment to him, in addition to the market value of his said stock, a substantial premium over and above said market value.

19. That on or about September 24th, 1952, the shares of stock of RKO Pictures Corporation were selling on the New York Stock Exchange at approximately \$4.50 per share.

20. That in the negotiations aforementioned the Chicago Syndicate made it a condition and Hughes acquiesced therein, that all the officers and directors in the Parent Company and its subsidiaries should forthwith resign and that under their bylaw power

to fill vacancies forthwith elect an entirely new directorates elected wholly by the Chicago syndicate, all in advance of payment of the entire purchase price which was to be computed on the basis of market-price for the Hughes stock plus a premium to Hughes of \$3,000,000 over and above said price.

21. Hughes not only failed to make any adequate investigation as to the reputation, standing or experience of the Chicago Syndicate but did not even meet them personally until they were present to sign the documents which transferred control to them.

22. On or about September 24, 1952, Hughes consummated the sale of control of the Parent Company and its subsidiaries by his own resignation and the successive resignations of the directors elected with him in June of 1952, which was followed by the election of a new member of the Board of the Parent Company of a person belonging to or named by the Chicago Syndicate and for the transfer of such control Hughes earned a profit of approximately \$3,000,000. In addition, Hughes received the prevailing market price for his stock which he [41] could not have obtained were said 1,103,000 shares offered on the New York Stock Exchange in the regular course.

23. The persons installed as directors of the Parent Company and its subsidiaries by Hughes and his co-directors were Ralph E. Stolkin, A. L. Koolish, Edward Burke, Raymond Ryan and Arnold M.

Grant, among others, who were part of or named by the Chicago Syndicate.

24. Upon their installation as directors of the Parent Company, the Chicago Syndicate chose Arnold M. Grant to be Chairman of the Board, under a five-year contract, at \$2,000 per week. They elected themselves to various executive offices at undisclosed salaries and took over management and control of the Fifty Million Dollar RKO enterprise and its assets aforementioned, with plenary power to deal with the same.

25. By exacting and receiving a price for his stock, which exceeded its market value by about \$3,000,000, Hughes in violation of his fiduciary duties to the Parent Company sold his position as a director and officer of the Parent Company and the similar positions of his co-directors and co-officers; traded upon the Parent Company's superior bargaining position, and appropriated to his own use a corporate asset for official action by him and his co-directors.

26. By reason of the foregoing, Hughes is accountable to the Parent Company for his profits and for its losses.

#### As to Both Causes of Action

27. (a) Subsequent to the assumption of control by the Chicago Syndicate of the said defendants adverse publicity concerning at least two of the directors, Stolkin and Koolish, [42] questioning

their character and qualifications, was broadcast and published with the result that three of the five directors, Stolkin, Koolish and Gorman (the last name being the nominee of Raymond Ryan) resigned, leaving only Grant and Burke in caretaker-control.

(b) Thereafter the Chicago Syndicate turned back their shares of the stock and control of the said defendants to Hughes at a loss to them and a profit to Hughes of a sum in excess of a million dollars.

(c) During the period of control of the Chicago Syndicate, given to it by Hughes, the said defendants were virtually at a standstill, and because of the confusion and the failure of the said defendants to have active management, and by reason of the acts of Hughes, as aforesaid, the said defendants lost and were damaged in excess of two million dollars.

28. Heretofore, on October 17th, 1952, a written demand was made on behalf of the plaintiffs Castleman upon RKO Pictures Corporation to bring this suit against Hughes. A copy of said written demand is attached hereto as Exhibit "A." Two weeks later an answer to the said demand was made by a law firm, retained as "independent counsel" by RKO's "Present management." A copy of said answer is annexed hereto as Exhibit "B." The reply to Exhibit "B" is hereto annexed as Exhibit "C." No further or other demand has been made for the reason that the retainer of the "independent counsel" by the "present management" may be a nullity for the reason that "present management" is legally

impotent to do any corporate act or thing under the Delaware Corporation Law and the Parent Company's bylaws. In any event, it would be unlikely to have "present management" recommend suit against [43] Hughes even if "independent counsel" were to report merit since the "present management" was installed by Hughes and is seeking an \$8,000,000 loan from Hughes and is friendly disposed toward him. Any demand on "present management" to bring suit would be futile.

Wherefore, plaintiffs pray for judgment as follows:

1. That Hughes be ordered to account for any profits, emoluments and gains received by him directly or indirectly from the transactions herein complained of and be ordered to pay over such amounts to the Parent Company or Radio Pictures as their interests may appear.

2. That Hughes be ordered to account for any damages to the Parent Company or Radio Pictures resulting from the transactions herein complained of and be ordered to pay over such amounts to them as their interests may appear.

3. That any and all contracts between the Parent Company and Radio Pictures with Hughes or any of his personal enterprises be declared to be null and void and of no effect and that their recession be decreed and that insofar as any parts thereof remain executory that their performance by the

Parent Company and Radio Pictures be restrained and enjoined.

4. That plaintiffs have such other and further relief as may be just and proper including a temporary receivership of the property of the Parent Company and Radio Pictures for and on behalf of all the stockholders of the Parent Company similarly situated.

5. That plaintiffs be awarded the costs and disbursements of this action, including a fair and reasonable allowance [44] for counsel and accountants fees, and other lawful expenses in connection with the prosecution of this action.

Dated: March 4, 1953.

BERNARD REICH,  
LOUIS KIPNIS and  
LEO B. MITTELMAN,

By /s/ BERNARD REICH,  
Attorneys for Plaintiffs. [45]

EXHIBIT A

Louis Kipnis  
111 Broadway  
New York 6, New York

October 17, 1952.

RKO Pictures Corporation,  
1270 Avenue of the Americas,  
New York 20, New York.

Gentlemen:

My clients, Eli B. Castleman and Marion V. Castleman, are the beneficial owners of 2,500 shares of the common capital stock of RKO Pictures Corporation (hereinafter RKO Pictures), some of which is registered in the name of Bennett, Smith & Co. and some of it in the name of Clark, Dodge & Co.

On their behalf, this demand is made upon you to bring suit against Howard R. Hughes, as follows:

(a) For an accounting by him to RKO Pictures of the approximately \$3,000,000 personal profit made by him in the sale of the officerships and directorships in RKO Pictures and of his approximately 30% of RKO Pictures common capital stock;

(See: McClure vs. Law, 161 N.Y. 78  
Bosworth vs. Allen, 168 N.Y. 157  
Mitchell vs. Dilbeck, 10 Cal. 2 341  
Insuranshares Corp. vs. Northern Fiscal Corp., 35 F.Supp. 22)

(b) To the extent that all the consideration money has not yet passed, to impress a trust upon the said unpaid balance due to Hughes for the benefit of RKO Pictures;

(c) To the extent that there have not yet been transferred on the stock books of RKO Pictures the change of [46] ownership of said approximately 30% of the Hughes stock to the purchasers to enjoin the transfer agent, The Chase National Bank of the City of New York, from recording said change of ownership on the transfer books;

(d) To compel Hughes to account for his official conduct as officer and director of RKO Pictures and of RKO Radio Pictures Inc., in the management and disposition of the funds and property of said corporation; and

(e) To compel him to pay to RKO Pictures such moneys as have been lost or wasted through his neglect or failure to perform his duties as such director and officer.

(See: *Bosworth vs. Allen*, *supra*.)

Please let me have your prompt reply since my clients consider the plight of the company extremely serious. In the event I do not have your immediate assurance that you will forthwith commence such a suit, I will continue the present suit of my clients to achieve such goals derivatively for RKO Pictures.

Very truly yours,

/s/ LOUIS KIPNIS. [47]

EXHIBIT B

Cravath, Swaine & Moore  
15 Broad Street  
New York 5, New York

October 30, 1952.

RKO Pictures Corporation

Dear Sir:

Your letter dated October 17, 1952, addressed to RKO Pictures Corporation, has been referred to us for reply by the Corporation.

As independent counsel to the Corporation, retained by its present management, we have been requested to advise the Corporation, among other things, with respect to the matters referred to in your letter. Until we have completed such investigation as we shall consider necessary in order to advise the Corporation in the premises, and have rendered the requested opinion, the Board of Directors of the Corporation will not be in a position to take action with respect to the demand contained in your letter.

If you have any facts in your possession which, in your opinion, would justify the Corporation bringing suit against Mr. Howard Hughes or any of the other former directors of RKO Pictures Corporation, in respect of the matters referred to in para-

graphs (d) and (e) of your aforesaid letter, we will be pleased to know of them.

Very truly yours,

(Signed)

CRAVATH, SWAINE &  
MOORE.

Louis Kipnis, Esq.

111 Broadway

New York 6, N. Y.

AA [48]

EXHIBIT C

Louis Kipnis

111 Broadway

New York 6, New York

October 31, 1952.

Cravath, Swaine & Moore,  
15 Broad Street,  
New York 5, New York.

re: RKO Pictures Corporation

Gentlemen:

I acknowledge with thanks receipt of your letter dated October 30, 1952, in the above-entitled matter.

You advise me therein that you have been requested to advise the Corporation as independent counsel with respect to the matters referred to in

my letter of October 17 “ \* \* \* among other things \* \* \*.”

May I request that you advise the corporation to furnish me with the result of any action taken by it in connection with the price agreed to be paid, or paid, for certain motion picture assets sold by Hughes Tool Company to RKO Radio Pictures, a wholly-owned subsidiary of the Corporation, all as described in the Proxy Statement for the Special Meeting of Stockholders to be held July 25, 1950, and concerning which transactions no further information appears to have been furnished to the stockholders.

Similarly will you furnish the same information relative to the motion picture, “The Outlaw.”

In view of the fact that you are conducting an investigation, may I suggest that I be permitted to participate within the limitations, of course, of Section 113 of the Stock Corporation Law of the State of New York and Section 29 [49] of the Delaware Corporation Law.

Assuring you of my cooperation, I remain,

Very truly yours,

C: Rko Pictures Corporation  
1270 Avenue of the Americas  
New York 20, New York

LK:ms

Duly verified.

[Endorsed]: Filed March 4, 1953. [50]

[Title of District Court and Cause.]

### NOTICE OF MOTION

To Bernard Reich, 9441 Wilshire Boulevard, Beverly Hills, California, Attorney for Plaintiffs:

Please take notice that the undersigned will bring the above Motion on for hearing before this Court in Courtroom No. 8, Post Office and Court House Building, Los Angeles, California, on the 13th day of April, 1953, at 10:00 a.m., or as soon thereafter as counsel can be heard.

/s/ T. A. SLACK,

Attorney for Defendant,  
Howard R. Hughes.

Dated March 25, 1953. [52]

[Title of District Court and Cause.]

### MOTION

The defendant, Howard R. Hughes, appearing herein specially and for this purpose only, moves the Court to dismiss the action or in lieu thereof to quash the return of service of summons on this defendant on the following grounds:

(A) A copy of the summons was not personally served on this defendant.

(B) A copy of the summons was not left at this defendant's dwelling house or usual place of abode.

(C) The Beverly Hills Hotel in Los Angeles, California, is not the usual residence or place of abode of this defendant and was not on March 6, 1953, the date on which service was attempted on this defendant.

(D) Since long prior to March 6, 1953, and at all times [53] material hereto this defendant has maintained his only residence and usual place of abode in Las Vegas, Nevada, and since establishing his residence in Nevada he has never returned to the State of California.

In support of such Motion, there is attached hereto the affidavit of Howard R. Hughes.

/s/ T. A. SLACK,

Attorney for Defendant,

Howard R. Hughes. [54]

### AFFIDAVIT

State of Nevada,  
County of Clark—ss.

Before me, the undersigned authority, on this day personally appeared Howard R. Hughes, known to me, who being by me duly sworn did upon oath state as follows:

I became a resident of the State of Nevada long prior to March 6, 1953. Since becoming a resident of Nevada, I have never resided in the State of California nor maintained therein a residence,

dwelling house or place of abode, nor have I authorized any person in California to accept service of summons in my behalf.

/s/ HOWARD R. HUGHES.

Sworn to and subscribed before me this 25th day of March, 1953.

[Seal]      /s/ ELAINE LARSEN,  
Notary Public in and for  
Said County and State.

My commission expires June 16, 1956.

[Endorsed]: Filed March 25, 1953. [57]

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[Title of District Court and Cause.]

MINUTES OF THE COURT—APRIL 13, 1953

Present: The Hon. Ben Harrison,  
District Judge.

Counsel for Plaintiffs: Bernard Reich.

Counsel for Defendants: Guy Knupp for  
Deft. RKO Radio Pictures, Inc.

Proceedings:

For hearing (1) motion on behalf of deft. Howard R. Hughes, appearing herein specially, to dismiss this action, or in lieu thereof to quash the return of service of summons on this defendant, pursuant to notice, motion, affidavit of Howard R. Hughes,

and memo. of points and authorities, filed March 25, 1953; (2) motion on behalf of deft. RKO Radio Pictures, Inc., for an order, pursuant to Sec. 834 of the Corporations Code of the State of California, requiring the plaintiffs to furnish security for reasonable expenses, including attorneys' fees, which may be incurred by defendant, in connection with such action, including expenses for which said corporation may become liable pursuant to Sec. 830 of the Corporations Code of the State of Calif., etc., pursuant to notice, motion, affidavit of Roy W. McDonald, and reasons, points, and authorities, filed April 2, 1953.

Attorney Reich makes a statement re continuance of said motions.

Attorney Knupp makes a statement.

It Is Ordered that cause as to hearing on motion (1) on behalf of deft. Howard R. Hughes, etc., is continued to April 27, 1953, 10 a.m.

Court makes a statement and It Is Ordered that cause as to hearing on motion (2) on behalf of deft. RKO Radio Pictures, Inc., is continued to June 8, 1953, 10 a.m.

EDMUND L. SMITH,  
Clerk;

MURRAY E. WIRE,  
Deputy Clerk. [77]

[Title of District Court and Cause.]

MINUTES OF THE COURT—APRIL 27, 1953

Present: The Hon. Ben Harrison,  
District Judge.

Counsel for Plaintiffs: Bernard Reich.

Counsel for Defendant Hughes: Raymond  
A. Cooke (of Texas), admitted specially  
for purpose of this case only, on motion  
of Atty. Reich.

Proceedings:

For hearing motion on behalf of deft. Howard R. Hughes, appearing herein specially, to dismiss this action, or, in lieu thereof, to quash the return of service of summons on this defendant, pursuant to notice, motion, affidavit of Howard R. Hughes, and Memo. of points and authorities, filed March 25, 1953.

On motion of Attorney Reich It Is Ordered that Raymond A. Cooke, of Texas, is admitted to practice in this Court for the purpose of this case only.

Attorney Cooke makes a statement and requests a continuance.

Attorney Reich makes a statement and consents to a continuance for hearing said motion.

It Is Ordered that cause is continued to June 8, 1953, 10 a.m., for hearing said motion.

EDMUND L. SMITH,  
Clerk;

MURRAY E. WIRE,  
Deputy Clerk. [78]

[Title of District Court and Cause.]

### STIPULATION

It Is Hereby Stipulated, Consented to and Agreed by and between the attorneys for the plaintiffs and the attorneys for the defendant RKO Radio Pictures, Inc., that the notice of the attorneys for the plaintiffs dated May 11, 1953, to take the deposition of the defendant RKO Radio Pictures, Inc., by Howard R. Hughes on the 28th day of May, 1953, at 10:00 a.m. at Room 214, California Bank Building, 9441 Wilshire Boulevard, Beverly Hills, California, be and the same hereby is adjourned until July 27, 1953, without prejudice to the right of the defendant RKO Radio Pictures, Inc., to move for an [79] order quashing said notice of deposition or, in the alternative, for an order directing that the deposition of the defendant RKO Radio Pictures, Inc., by Howard R. Hughes be taken at the same time and place as the deposition of said Howard R. Hughes in an action pending in the Eighth Judicial District of the State of Nevada, in and for the County of Clark, entitled Eli B. Castleman and Marion V. Castleman, doing business as Wolverine Textile Company, and Louis Feuerman, plaintiffs, against J. Miller Walker, Francis J. O'Hara, Jr.; Howard R. Hughes, Noah Dietrich, Ned E. Depinet, Hughes Tool Company, RKO Pictures Corporation and RKO Radio Pictures, Inc., defendants.

It Is Further Stipulated, Consented to and Agreed by and between such attorneys that the

return day and the submission of the motion heretofore served by the defendant RKO Radio Pictures, Inc., upon the attorneys for the plaintiffs requesting from the Court an order, pursuant to Section 834 of the Corporations Code of the State of California, requiring the plaintiffs to give security for expenses which such moving defendant may incur in this action, be and the same is hereby extended to August 10, 1953.

It Is Further Stipulated, Consented to and Agreed by and between such attorneys that in accordance with Section 834(c) of the Corporations Code of the State of California, prosecution of this action shall be stayed until ten (10) days after the motion for security for expenses has been disposed of and that the time of the defendant RKO Pictures, Inc., to answer or move with respect to the complaint herein be and the same is [80] hereby extended until ten (10) days after such motion has been disposed of.

Dated: May 22, 1953.

By /s/ BERNARD REICH,  
LOUIS KIPNIS and  
LEO B. MITTELMAN,

By /s/ LOUIS KIPNIS,  
Attorneys for Plaintiffs.

MITCHELL, SILBERBERG &  
KNUPP,

By /s/ GUY KNUPP;

DONOVAN, LEISURE,  
NEWTON & IRVINE,

By /s/ ROY W. McDONALD,  
Attorneys for Defendant,  
RKO Radio Pictures, Inc.

It Is So Ordered: May 25, 1953.

/s/ BEN HARRISON,  
Judge.

[Endorsed]: Filed May 25, 1953. [81]

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[Title of District Court and Cause.]

MINUTES OF THE COURT—JUNE 8, 1953

Present: The Hon. Ben Harrison,  
District Judge.

Counsel for Plaintiffs: No appearance.

Counsel for Defendants: Raymond A.  
Cook (Houston, Texas), of counsel for  
deft. Howard R. Hughes.

Proceedings:

For hearing motion on behalf of defendant Howard R. Hughes, appearing specially, to dismiss this action, or in lieu thereof, to quash the return of service of summons on this defendant, pursuant to notice, motion, affidavit of Howard R. Hughes, and memo. of points and authorities, filed March 25, 1953.

Attorney Cook makes a statement.

It Is Ordered that said motion to dismiss is granted; counsel for said deft. Hughes to prepare and serve form of order and present same for signature.

EDMUND L. SMITH,  
Clerk;

By MURRAY E. WIRE,  
Deputy Clerk. [82]

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In the United States District Court, Southern  
District of California, Central Division

No. 14,848-BH

ELI B. CASTLEMAN and MARION V. CASTLEMAN, Doing Business as WOLVERINE TEXTILE COMPANY, and LOUIS FEUERMAN,

Plaintiffs,

vs.

HOWARD R. HUGHES, RKO PICTURES CORPORATION, RKO RADIO PICTURES, INC., and THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK,

Defendants.

### ORDER

On the 8th day of June, 1953, came on to be heard the motion of defendant, Howard R. Hughes, to

dismiss the action, or in lieu thereof to quash the return of service of summons; and it appearing to the Court by uncontroverted affidavit that the defendant, Howard R. Hughes, became a resident of the State of Nevada long prior to the period material hereto,

It is, therefore, Ordered and Decreed that the return of service of summons as to the defendant, Howard R. Hughes, be and the same is hereby quashed.

It further appearing to the Court by the record in this action that there is another action pending in the State of Nevada [83] in which the same plaintiffs herein are the plaintiffs, and in which additional necessary defendants are joined, with all parties properly before the Court; that such action is being actively prosecuted before that Court; and that the relevant Nevada Rules of Civil Procedure are identical with the Federal Rules of Civil Procedure governing actions of this type,

It is, accordingly, further Ordered and Decreed that this action be, and the same is hereby dismissed without prejudice, the taxable costs of court exclusive of attorneys' fees to be adjudged against the plaintiffs in the within action.

Entered this 26th day of June, 1953.

/s/ BEN HARRISON.

United States District Judge.

Approved as to Form:

/s/ LOUIS KIPNIS,

.....,  
HENRY HERZBRUN,

Attorneys for Plaintiffs.

/s/ T. A. SLACK,

/s/ RAYMOND A. COOK,

Attorneys for Defendant,  
Howard R. Hughes.

/s/ ROY W. McDONALD,

/s/ GUY KNUPP,

Attorneys for Defendant,  
RKO Radio Pictures, Inc.

[Endorsed]: Filed June 26, 1953.

Docketed and entered June 26, 1953. [84]

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[Title of District Court and Cause.]

**MOTION TO VACATE ORDER OF DISMISSAL  
DATED JUNE 26, 1953**

Plaintiffs move to vacate the Order of Dismissal dated June 26, 1953, on the following grounds:

1. The Order purports to afford relief beyond that which was applied for by, and is different in kind from the demand in, the motion or motions.

2. The Order purports to be wider in scope and affords relief beyond that which was directed by minute order.

3. The defendants failed to comply with the said minute order in that plaintiffs' attorneys were not served with any proposed order.

4. Defendants did not comply with Local Rule 7(a).

5. Justice requires the vacation of the said [86] Order.

The motion will be based on the following:

1. The records and files of this Court.
2. The Notice of Hearing herein.
3. Plaintiffs' Memorandum of Points and Authorities.
4. An affidavit of Bernard Reich to be filed within the time fixed by the Rules.

Dated: August 11, 1953.

/s/ BERNARD REICH,

Attorney for Plaintiffs. [87]

[Title of District Court and Cause.]

#### NOTICE OF HEARING

To the Defendants and to Their Attorneys, and to  
Louis Kipnis and Leo B. Mittelman, Esqs.:

Please Take Notice that the within Motion will be heard by the above-entitled Court, United States District Judge Ben Harrison, in his courtroom in the Federal Post Office and Court House Building, Los Angeles, California, at 10 a.m., or as soon there-

after as counsel can be heard, on the 5th day of October, 1953.

Dated: August 11, 1953.

/s/ BERNARD REICH,  
Attorney for Plaintiffs.

[Endorsed]: Filed August 17, 1953. [88]

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[Title of District Court and Cause.]

AFFIDAVIT OF BERNARD REICH IN SUP-  
PORT OF MOTION TO VACATE ORDER  
OF DISMISSAL MADE JUNE 26, 1953

State of California,  
County of Los Angeles—ss.

Bernard Reich, being first duly sworn, deposes and says:

1. I am local attorney of record for the plaintiffs in the above-entitled action.

2. (a) Louis Kipnis and Leo B. Mittelman, whose address is 111 Broadway, New York 6, New York, are New York attorneys who appear with me as attorneys for the plaintiffs, although they are not licensed to practice in the State of California and have not been admitted for the purposes of this case.

(b) Donovan, Leisure, Newton & Irvine of 2 Wall Street, New York 5, New York, have appeared in this action as [96] attorneys for defendant RKO Radio Pictures, Inc.

(c) Thomas A. Slack of 7000 Romaine Street, Hollywood 38, California, and Raymond A. Cook of Texas, have appeared as attorneys for the defendant Howard R. Hughes.

(d) Mitchell, Silberberg & Knupp of Los Angeles have appeared as attorneys for the defendant RKO Radio Pictures, Inc.

3. On Saturday, December 13, 1952, I received a telephone call from New York from Messrs. Kipnis and Mittelman retaining me to file suit in behalf of the plaintiffs. On Monday, December 15, 1952, I filed this suit.

4. Mr. Kipnis had previously filed a similar suit in the Supreme Court of the State of New York and there was pending before New York Supreme Court Justice Henry Clay Greenberg Mr. Kipnis' motion for the appointment of a receiver.

5. On December 26, 1952, I read in the trade papers and learned for the first time that plaintiffs had filed a derivative action in the state court in Las Vegas, Nevada. I was not informed by Messrs. Kipnis and Mittelman of their intentions to file such suit.

6. (a) On January 27, 1953, a local trade paper reported that the motion in New York for the appointment of a receiver had been withdrawn. Attached hereto and marked Exhibit "A" is a true copy of the said article purporting to recite the proceedings before Mr. Justice Greenberg.

(b) The motion for the appointment of a re-

ceiver was withdrawn in New York not only without my consent but without my knowledge or prior consultation.

7. Upon information and belief the original complaint filed here, except for jurisdictional allegations, is identical with the New York and Nevada complaints. However, the amended [97] complaint in this action introduced many additional issues.

8. (a) On or about February 4, 1953, I received a notice from the Court that the action had been placed on the calendar pursuant to Rule 16 for Monday, February 9, 1953.

(b) On February 5, 1953, I wrote to Judge Harrison asking his indulgence until I had an opportunity to confer with New York counsel personally in New York City. I received notice from the clerk that the hearing scheduled for February 9th had been continued to March 2, 1953.

(c) I conferred with New York counsel and it was agreed that the complaint would be amended and service made. I so informed Judge Harrison on March 2, 1953.

9. (a) The amended complaint herein was filed on March 4, 1953, and service was thereafter made on the defendant Howard R. Hughes at the Beverly Hills Hotel and on RKO Radio Pictures, Inc., at its Los Angeles studio. The defendant RKO Pictures Corporation refused to submit to process on the ground that it was not doing business in California.

(b) The defendant RKO Radio Pictures, Inc., was served not only with process but with a Notice of the Taking of the Deposition of its officer and employee, the defendant Howard R. Hughes.

10. With respect to the Nevada action, I learned that Mr. Hughes had submitted himself to the jurisdiction in Nevada as did the defendant RKO Pictures Corporation, notwithstanding it did no more business in the State of Nevada than it did in the State of California. I learned for another [98] thing that Nevada has no security law such as may be available to defendants in the State of California. From the U. S. Marshal I learned that Mr. Hughes had purported to renounce his Beverly Hills residence for Las Vegas, Nevada, apparently between the time this action was filed and the complaint was amended and served at the Beverly Hills Hotel, and shortly before he accepted service of process in the Nevada action.

11. Messrs. Kipnis and Mittelman, by letter and by telephone, importuned me and instructed me to withdraw the Notice of Mr. Hughes' deposition. I told them that the deposition was necessary on the issue of any application for security. They both assured me that no such motion would be made and if made they would consider it an act of bad faith and that I would then be free to notice Mr. Hughes' deposition. I complied with their request; but soon thereafter was served with two sets of motion papers, one in behalf of the defendant Howard R. Hughes to quash the service on him on

the ground that he was not at the time of purported service a resident of Beverly Hills, California, but had removed to Las Vegas, Nevada. The second was a motion in behalf of the defendant RKO Radio Pictures, Inc., for security pursuant to the Corporations Law of the State of California. It is significant that Mr. Hughes' motion to quash does not give the date when he removed to Las Vegas, Nevada.

12. Both motions were made returnable April 13, 1953.

13. On April 3, 1953, I noticed Mr. Hughes' deposition for April 9, 1953, four days before the return date of the defendants' said motions.

14. Again Messrs. Kipnis and Mittelman importuned me to withdraw the notice of Mr. Hughes' deposition. I did so when the defendants agreed to put Hughes' motion to quash process [99] over to April 27, 1953, and RKO's motion for security over to June 8, 1953.

15. The difference between New York counsel and myself at this point was centered on my opinion that I could not resist the motion for security without taking the deposition of Mr. Hughes, and that if I was going to take the deposition of Mr. Hughes I should examine him on all points, including his residence. New York counsel wished me to default on the motion to quash service on Mr. Hughes and not to take the deposition of Mr. Hughes. As to the motion for security, they took no position.

16. On April 22, 1953, Mr. Kipnis wrote me and instructed me to default on Mr. Hughes' motion to quash returnable April 27, 1953, and sent a copy of this letter to the Court.

17. The letter contains a denial of certain facts alleged by me in my letter of April 20th to Mr. Mittelman. As my letter contains matters which must remain confidential, unless ruled otherwise by the Court, I cannot in this affidavit refute the whole of Mr. Kipnis' letter, a copy of which went to the Court.

18. Prior to the return date of April 27, 1953, however, I met with one of the attorneys for Mr. Hughes who agreed that the motion should go over to June 8th. This was approved by Judge Harrison on April 27th, although the Court referred to Mr. Kipnis' letter instructing me to default. My duty to my clients prevented me from laying the entire matter before the Court. I merely stated to Judge Harrison that there was a difference between New York counsel and myself and that I hoped to have it resolved before June 8th.

19. In the meantime, at the instance of Messrs. Kipnis and [100] Mittelman, on May 22, 1953, I entered into a stipulation with Mr. Guy Knupp of Mitchell, Silberberg & Knupp and Mr. Roy W. McDonald of Donovan, Leisure, Newton & Irvine, attorneys for defendant RKO Radio Pictures, Inc., which continued the motion for security to August 10, 1953, and continued Mr. Hughes' deposition to July 27, 1953. It was also arranged that the plain-

tiffs would default on the motion to quash service of process on Mr. Hughes.

20. Pursuant to the understanding I did not appear on the return date of the motion to quash the service of process on Mr. Hughes.

21. On June 27, 1953, I received from the clerk of the court notice that "Order to quash service of summons and dismissing action has been docketed and entered." On or about June 29th I checked the docket and found an entry which although ambiguous indicated that the action had been dismissed against the defendant Hughes only. However, I brought the matter to the attention of the Chief Deputy Clerk, Mr. Theodore Hocke, who stated that he would take the matter up with Judge Harrison's clerk and have the docket corrected.

22. I knew nothing and thought nothing more of the matter until I received a telephone call on July 14, 1953, from an attorney in the office of Mitchell, Silberberg & Knupp, who asked me did I consider that the order in this case dismissed the action against all of the defendants. Thinking that he was referring to the minute order, I said "no" and that I had straightened the matter out in the clerk's office; whereupon counsel read to me the order of this Court dated June 26, 1953. This order does indeed dismiss the action against all of the defendants, but it was made without my knowledge or consent.

23. On or about July 16, 1953, I received a copy of the [101] order made June 26th. This was the

first I ever saw of the order. I would comment on that order as follows:

(a) It was apparently prepared by the attorneys for Mr. Hughes as their name and address appear at the head of the document. Neither Mr. Slack nor Mr. Cook appeared for anyone other than Hughes and yet the order dismisses the action against all defendants.

(b) While the recitals are to the effect that there is another action in Nevada between the same parties, that the Nevada action is being actively prosecuted, and that the relevant Nevada rules are identical with the federal rules, there is no recital that the issues are the same. The fact is that the issues are not the same. I have been informed by Mr. Kipnis, and therefore allege on information and belief, that the additional allegations made in the amended complaint here have not been added to the Nevada action.

Implicit in the order submitted is that trial in the Nevada State Court is preferable to the California Federal Court. This would seem contrary to the fact when it is considered that all the records are in California and that most of the important witnesses are here. As indicated later in this affidavit, Mr. Kipnis came to California to take depositions in connection with the Nevada action. Here he took the depositions of such important witnesses as Dore Schary, N. Peter Rathvon, Jerry Wald, Norman Krasna, Sid Rogell, Sam Bischoff, Jack Skirball and Frank Ross. [102]

(c) The order is approved as to form for the plaintiffs by Louis Kipnis, not the responsible local attorney, and a person not admitted to practice in this state or for the purposes of this action.

(d) There is a space for the approval of Mr. Henry Herzbrun, purportedly one of the attorneys for plaintiffs. Mr. Herzbrun did not give his consent or approval to the order because he also is not attorney of record for the plaintiffs.

(e) There is no space for my approval, notwithstanding to the knowledge of all defendants I was the only local attorney of record for the plaintiffs, and the only one authorized to sign any proposed order. The Court's attention is respectfully referred to all previous stipulations and orders made herein. All of them provide for and bear my signature. In fact on one occasion, and at the instance of the attorneys for the defendant RKO, Mr. Kipnis signed a stipulation withdrawing one of the notices for Mr. Hughes' deposition without my knowledge or consent; but on the insistence of Mitchell, Silberberg & Knupp the stipulation was presented to me for my signature.

24. Prior to June 26th there were negotiations between Messrs. Kipnis and Mittelman on the one hand and myself on the other to the end of having Mr. Herzbrun substituted in my place.

25. On May 18, 1953, Mr. Mittelman wrote me for the first time that it was never his intention to let the security motion go by default and that

he and Mr. Kipnis were stipulating to a "simultaneous adjournment of the security motion plus the [103] notice of taking of deposition of Hughes, all subject to Court approval and without prejudice." Mr. Mittelman wrote me further that "if the stipulation adjourning the 'security' motion and the deposition come in before you are formally substituted, won't you please sign it. If it comes in after you are substituted, then, of course, we will have Herzbrun sign it, and we have so written him."

26. Not having been substituted by May 22, 1953, I entered into the stipulation with the attorneys for the defendants as already set forth, and which continued Mr. Hughes' deposition to July 27, 1953, and the motion for security to August 10, 1953.

27. However, I wrote to Mr. Mittelman that I was happy with his decision finally to go forward and proposed that my substitution be effectuated in a formal writing between us which could be filed in New York, Nevada and California.

28. I asked Mr. Mittelman in that letter for a commitment that he would press vigorously in Nevada the charges made here in California. I advised him that should he want my evidence and my help I gladly offered it.

29. I wrote this letter May 19, 1953, and never received a reply.

30. On June 26, 1953, I read in the Press and learned for the first time that at the instance of Mr. Herzbrun subpoenas were issued out of the

California Superior Court calling for the depositions of various persons in connection with the Nevada action. I wrote to Messrs. Kipnis and Mittelman on the same date that I considered these steps as in breach of our relationship, and asked that they forward to me immediately the agreement of substitution.

31. On July 13, 1953, Mr. Kipnis visited me at my office. [104] Not once in that conversation did Mr. Kipnis tell me that the action had been dismissed. On the contrary our conversation was premised on the prosecution of the California action.

32. I want to emphasize that notwithstanding the attorneys for the defendants at all times knew that I was local attorney of record, I was never advised by any of them of the contemplated dismissal of the action against all defendants. It would seem, however, that counsel for the defendants were informed of a proposed substitution of Mr. Herzbrun and myself. This accounts for the place on the proposed order for Mr. Herzbrun's signature; and although Mr. Herzbrun refused to sign, not being the local attorney of record, counsel for the defendants nevertheless submitted the proposed order to the Court.

33. Nor do I wish to stand on any technical defects in the order submitted by the defendants. Had the order been served on me as the minute order of this Court made on defendant Hughes' motion to quash directed, I would not have con-

sented to it. This is a stockholders' derivative action and I consider that my duties to the Court and to the stockholders transcend my duty to New York counsel. This paramount duty would have prevented me from consenting to a dismissal of this action against any and all of the defendants. If called upon by the Court I will give my reasons under oath. I say only at this time that this action should not be dismissed and that this Court should retain jurisdiction pending the outcome of the state action in Nevada.

34. I am concerned only with the best interests of the stockholders and with my duty as an officer of this Court. The difficulty here does not truly arise by reason of any controversy among the attorneys for the plaintiffs. Essentially it arises from the imposition of defendants' will on [105] plaintiffs' New York lawyers against the public interest and against the interests of the scattered and procedurally impotent thousands of small RKO stockholders. It is they who look to this Court for justice and protection.

/s/ BERNARD REICH.

Subscribed and sworn to before me this 9th day of September, 1953.

[Seal]     /s/ HELEN SPARKMAN,  
Notary Public in and for the County of Los Angeles, State of California. [106]

## EXHIBIT "A"

(Article Appearing in Variety on  
January 27, 1953.)

"Drop RKO Receivership Suit; Lawyer Disclaims  
Special 'Consideration.'

"New York, Jan. 26—A petition of three RKO Pictures minority stockholders seeking to place the company in temporary receivership was withdrawn today at a hearing before Supreme Court Justice Henry Clay Greenberg. Explaining his move to the court, stockholders' attorney Louis Kipnis said he decided not to press the application on the basis of affidavits submitted by various parties concerned. These papers pointed out the RKO board is now reconstituted compared with the situation last November, when only two directors were in office.

"Before granting the withdrawal, Justice Greenberg expressed considerable surprise at the latest development. 'Isn't this an extraordinary termination of a motion?' the court asked Kipnis. 'Affidavits of some 40-odd pages,' the jurist added, 'were handed me last November. These need some explanation in the light of the seriousness of the application. \* \* \*'

"Ordering Kipnis to take the stand, Greenberg then asked the witness if either he or his clients had accepted or been promised any 'consideration' to enter the withdrawal. Kipnis made a stout denial, and testified the step had been taken 'freely and without any promises.'

“Receivership petition was part of a derivative stockholders’ suit brought against RKO last Nov. 13 by Eli B. Castleman, Marion V. Castleman, who hold 2,500 shares, and Louis Feuerman, holder [107] of 25 shares. Also named defendants were Howard Hughes and several subsidiaries. Complaint generally charges ‘waste and mismanagement.’ In addition, it is asked that Hughes be compelled to make an accounting.

“Although the receivership motion is now discontinued, Kipnis emphasized the suit proper will be pressed. Actual withdrawal of the receivership petition was accomplished by stipulation entered into between Kipnis and RKO attorneys. It withdraws the motion ‘without prejudice and without costs.’

“Among those attending the 10-minute hearing were Albert R. Connelly of Cravath, Swaine & Moore, RKO’s rep, and Isidor Kresel. Latter was there as an observer for David J. Greene, Wall Street broker, who has substantial holdings in RKO.”

Affidavit of Service by Mail attached.

[Endorsed]: Filed September 10, 1953. [108]

[Title of District Court and Cause.]

MOTION TO APPEAR AS  
AMICUS CURIAE

Raymond A. Cook, a licensed attorney at law in the State of Texas, heretofore permitted by this Honorable Court to appear in the above-captioned action on behalf of the defendant, Howard R. Hughes, hereby respectfully moves the Court for leave to appear before this Court as an amicus curiae for the purpose solely of presenting to the Court certain matters of fact which may be of interest to the Court upon a hearing of the recently filed "Motion to Vacate Order of Dismissal, Dated June 26, 1953"; and subject to the Court's action in permitting or denying such appearance the annexed affidavit is respectfully submitted for this Court's consideration.

/s/ RAYMOND A. COOK. [111]

[Title of District Court and Cause.]

AFFIDAVIT

State of Texas,  
County of Harris:

Raymond A. Cook, being first duly sworn, deposes and says:

I.

I am a licensed attorney at law with my residence and office in Houston, Harris County, Texas. On

April 27, 1953, I was granted leave by the Honorable Ben Harrison, before whom the above-captioned action was pending, to appear specially in the action on behalf of the defendant, Howard R. Hughes; and pursuant to such leave did appear for the purpose of presenting and arguing on June 8, 1953, a motion to dismiss or in the alternative to quash service of process on Mr. Howard R. Hughes. The matters contained in this affidavit relate to the circumstances at such appearance and the order entered by this Court on June 26, 1953.

## II.

On April 27, 1953, this Honorable Court in chambers stated that he saw no reason for this case to be continued on [112] his docket when the same controversy was going forward in another Court. On that same day in open court Mr. Bernard Reich, then the attorney of record for plaintiffs, in response to a direct inquiry from this Court stated that by June 8, 1953, "all differences with Mr. Kipnis will have been resolved."

## III.

Thereafter T. A. Slack, the attorney of record for Howard R. Hughes, received the letter dated May 11, from Louis Kipnis, which is annexed to the affidavit as Exhibit A, such letter advising Mr. Slack that the authority of Bernard Reich had been revoked and cancelled and that a new attorney was being substituted in his place. Shortly thereafter he was advised that Mr. Henry Herzbrun, a licensed

attorney at law of Los Angeles, California, had been appointed as the local attorney of record in place of Mr. Reich.

#### IV.

On June 8, 1953, the defendant's Motion to Dismiss or in the Alternative to Quash Service of Process came on for hearing before this Court. No attorney appeared for the plaintiffs. This Honorable Court indicated from the bench his decision to sustain the motion. The undersigned attorney then inquired of the Court if the order should be prepared as a dismissal of the action or merely quashing of service of process, whereupon the Court asked if in counsel's opinion the motion was broad enough to permit a dismissal. The undersigned, being then and now confident that the motion was sufficient to permit dismissal within the Court's inherent discretionary power, so stated to the Court but at the same time expressly pointed out that no attorney for the plaintiffs was present and the plaintiffs had not previously indicated a willingness to dismiss the action. Whereupon this Court directed that the order be prepared as a dismissal and submitted to opposing counsel for their approval. [113]

#### V.

Thereafter on June 9, 1953, the order in substantially the form as ultimately entered by the Court was presented to Mr. Louis Kipnis by the letter, a copy of which is annexed to this affidavit as Exhibit B. In view of the statement in open court

by Bernard Reich that his differences with Mr. Kipnis would be resolved by June 8, 1953, and in view of the letter referred to above as Exhibit A announcing the termination of his authority, no copy of the letter or order was sent to Mr. Reich; but a copy was sent to Mr. Henry Herzbrun, the new local attorney. Mr. Herzbrun then informed the undersigned that Bernard Reich was refusing to execute a written substitution of attorneys but that under the local rules a dismissal of this kind could be presented with the form endorsed only by the leading counsel. The order was then delivered to the Court either by Mr. Herzbrun or by the RKO attorneys. Such action in the opinion of the undersigned attorney constituted full compliance with this Court's local rules and in particular with Rule 7A and Rule 1 (e) (3).

## VI.

The undersigned is familiar with the pre-trial depositions which have been taken by the plaintiffs in the Nevada action. To date seventeen depositions have been taken, including most of the parties or witnesses with personal knowledge of the circumstances or transactions suggested by the pleadings. Notice has been delivered under the Nevada rules to take the oral deposition of Mr. Howard R. Hughes on September 28, 1953, in Las Vegas, Nevada. The case is set for trial on its merits on January 5, 1954. No reason is known why the case will not proceed at that time to final judgment as to

all matters in controversy among the parties before the Court. [114]

## VII.

The undersigned has read the affidavit of Bernard Reich which was filed with the motion to vacate and has been informed of certain statements made by Mr. Reich to the trade press in apparent explanation of his affidavit. There are serious inaccuracies in both but it is neither becoming nor necessary to confuse this record with immaterialities. However, it is appropriate for me to state and I do hereby state as a fact that in no sense have Howard R. Hughes or his attorneys "imposed their will" upon the attorneys for plaintiffs or in any way sought any collusive advantage in the Nevada action. Furthermore, this Court should be aware that upon the first hint of dissidence from Mr. Reich the undersigned in good faith sought to inquire of him the reasons for his attitude. In response to such inquiry Mr. Reich refused to discuss the matter and referred the undersigned to Mr. Clore Warne, an attorney of Los Angeles, California, whom Mr. Reich identified as the attorney whom he had retained "to protect his interest in the matter."

## VIII.

This affidavit is submitted by the undersigned solely as an *amicus curiae* and not on behalf of Howard R. Hughes, on whom no service of process has been perfected. However, in the Court's discretion and at its direction the undersigned is prepared to present such further matters of fact or

law as may be material to a disposition of the pending motion.

/s/ RAYMOND A. COOK.

Subscribed and sworn to before me on the 18th day of September, 1953.

[Seal]      /s/ VIRGINIA CAMPBELL,  
Notary Public in and for  
Harris County, Texas. [115]

EXHIBIT A

(Copy)

Louis Kipnis  
Attorney & Counselor at Law  
111 Broadway, New York 6, New York  
Worth 2-3100

May 11, 1953.

Thomas A. Slack, Esq.,  
7000 Romaine Street,  
Hollywood 38, California.

Re: Castleman v. Walker (California Case).

Dear Mr. Slack:

Please be advised that by letter dated and mailed May 7, 1953, my associate and I revoked and cancelled whatever authority we had heretofore granted to Bernard Reich, Esq., of 9441 Wilshire Boulevard, Beverly Hills, California, in the above matter. We

also requested that he do nothing further in the case and that we were arranging for a new attorney to be substituted in his place.

Very truly yours,

/s/ LOUIS KIPNIS.

LK:ms [116]

(Copy)

EXHIBIT B

June 9, 1953.

Mr. Louis Kipnis,  
111 Broadway,  
New York 6, New York.

Re: Castleman, et al., vs. Hughes, et al.

Dear Mr. Kipnis:

Yesterday in the above action I urged the motion of Mr. Hughes to dismiss or in the alternative to quash summons. Apparently on your authority Mr. Herzbrun did not appear, nor did Mr. Reich, and the Court granted the motion.

The Court specifically inquired if the motion was in sufficient form to permit an order of dismissal of the entire action. You will recall the Court's previous comments that there was no justification for this suit "cluttering up" his docket with the same plaintiffs prosecuting a similar action in Nevada. I submitted to the Court that our motion was suf-

ficient, but pointed out that the plaintiffs in acquiescing in a quashing of service were not necessarily agreeing to a dismissal. However, the Court directed that the order be prepared to cover a dismissal, and enclosed herewith is the form of order which I am presenting.

From our various conversations, and from the current activity in the Nevada action, I gather that with the quashing of the Hughes service there is no longer any reason for keeping the California action on the docket. However, you may wish to modify or enlarge the recitations; and if so, I suggest that you retype the order in your amended form and re-circulate it for signatures.

Yours very truly,

/s/ RAYMOND A. COOK.

CC: Henry Herzbrun,  
Guy Knupp,  
Roy W. McDonald,  
T. A. Slack.

[Endorsed]: Filed September 21, 1953. [117]

[Title of District Court and Cause.]

REPLY AFFIDAVIT OF BERNARD REICH  
IN OPPOSITION TO MOTION AND AFFI-  
DAVIT OF RAYMOND A. COOK AS  
AMICUS CURIAE

State of California,  
County of Los Angeles—ss.

Bernard Reich, being first duly sworn, deposes and says:

Raymond A. Cook is no friend of the Court. He appeared in this action as one of the attorneys for the defendant Howard R. Hughes. He cannot, therefore, act as amicus curiae. (See Memorandum submitted herewith.)

I will answer the affidavit of Mr. Cook using the same paragraphing:

I.

Defendant Howard R. Hughes did move to dismiss the action [as against him], or in lieu thereof to quash service on him on grounds which went to the service and not to the [147] dismissal of the action. The motion could only have been construed as a motion to quash the service, or at best a motion to dismiss the action as against the defendant Hughes. No motion was made by any other defendant for a dismissal of the entire action. Furthermore, the motion by Mr. Hughes was made at a time when there was an outstanding stipulation for the taking of his deposition and for the hearing of a motion for security.

Mr. Cook admits that plaintiffs were unwilling to dismiss the action (His Affidavit, Paragraph IV, page 2).

## II.

I knew of no conference on April 27, 1953, in the judge's chambers.

I did say in open court that I would resolve all differences with Mr. Kipnis by June 8, 1953. I said this in support of my request for a continuance of the motion from April 27th to June 8th. My differences with Mr. Kipnis were resolved in that while the motion to quash service was not to be opposed, the motion for security would be, and the action prosecuted.

## III.

I did not receive a copy of the letter dated May 11th from Mr. Kipnis to Mr. Slack. I did not advise either Mr. Slack or Mr. Cook that I would be substituted out of the case. To the contrary, I told Mr. Cook before and after May 11th, that I would see to it that the Court was advised of all the facts in this case before I was substituted out of it. Mr. Cook and Mr. Slack knew after May 11th, the date of the so-called revocation of authority, that I was acting for the plaintiffs. They and every defendant knew that it was I who signed the stipulation dated May 22, 1953, more than ten days after the [148] so-called letter of revocation of authority. Moreover I talked to Mr. Cook just prior to June 8th, telling him that I might or might not appear on June 8th, and that in any event I was not opposing the motion

to quash service on Mr. Hughes. Mr. Slack and Mr. Cook at all times knew that I would oppose any dismissal of this action so long as I was attorney of record.

#### IV.

Notwithstanding the Court's direction that an order be prepared and submitted to opposing counsel for their approval, I never received any such proposed order, nor was I even informed that such an order was contemplated. Instead the proposed order was submitted to Mr. Henry Herzbrun, not an attorney of record; and when he refused to sign for that reason, the order was never submitted to me or to any local counsel but was presented to the Court with Mr. Herzbrun's signature absent. I have been advised and therefore allege that no explanation was made to the Court as to why neither I nor Mr. Herzbrun gave their so-called approval.

#### V.

I do not know what Mr. Herzbrun advised when the proposed order was submitted to him. I know only that Mr. Herzbrun did not telephone me about the matter. I know also that Mr. Herzbrun knew that I was still local attorney of record and I am most anxious to see an affidavit from Mr. Herzbrun that he informed Mr. Cook that my signature was not necessary. As to Mr. Cook's opinion that he complied with the Rules of this Court, I say only that Mr. Cook is not admitted to practice in this Court, except for this case. I say also that there is

no explanation to this Court as to why I was not informed of what was taking place unless it was that the defendants and [149] their counsel did not want the Court to learn the true facts.

VI.

No answer required.

VII.

Mr. Cook's statement that there are serious inaccuracies in my papers is without value in the absence of specificity. Mr. Cook states further that at the first hint of dissidence he in good faith inquired of me of the reasons for my attitude. He fails to state when this was. The facts are that Mr. Cook's inquiry was made on or about July 16, 1953, following my letter dated July 15, 1953, and delivered on that date to the attorneys for RKO as follows:

"Delivered by Hand

"July 15, 1953.

"Mitchell, Silberberg & Knupp and

"Roy W. McDonald, Esq.,

"6399 Wilshire Boulevard,

"Los Angeles 48, California.

"Re: Castleman v. Hughes,

DC Cal. 14848-BH.

"Gentlemen:

"I learned for the first time yesterday, from your Mr. George Benedict, of the formal order made

June 26, 1953, in the above matter dismissing the action against all parties.

“This order was presented to Judge Harrison without my knowledge or consent, and notwithstanding I am the responsible attorney of record for the plaintiffs.

“The order is erroneous and invalid as going beyond the motion made on behalf of Mr. Hughes to quash the service upon him and to dismiss the action as against him only, and as having been submitted to Judge Harrison without my signature of approval. [150]

“As of this writing I still have not seen the order, although Mr. Benedict is sending me a copy which I ought to receive today.

“Intend to correct the record before Judge Harrison and invite you to attend. I will inform you of the time shortly.

“Very truly yours,

“/s/ BERNARD REICH.

“cc: Louis Kipnis, Esq., c/o Henry Herzbrun, Esq.”

Mr. Cook, therefore, knew full well the reason for my attitude. This was the last straw and I told Mr. Cook so, and I did indeed refer him to Mr. Warne.

I do not know whether I told Mr. Cook that I had retained Mr. Warne “to protect my interests in the matter”; but I could very well have done so, among other things. If I did not tell him at that conversation, I told him at others when he tried to persuade me not to oppose any of the motions which

the defendants were making in this action, that my duty to the stockholders and to the Court transcended any duty that I owed to Messrs. Kipnis and Mittelman. I told him further that while he and the other attorneys could impose their will on Messrs. Kipnis and Mittleman, they could not do it to me.

VIII.

Again I say that Mr. Cook is no friend of the Court; although I have no objection to his affidavit becoming a record in this case.

/s/ BERNARD REICH.

Subscribed and sworn to before me this 1st day of October, 1953.

[Seal]     /s/ HELEN SPARKMAN,  
Notary Public in and for the County of Los Angeles,  
State of California.

Affidavit of Service by Mail attached.

[Endorsed]:   Filed October 2, 1953. [151]

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[Title of District Court and Cause.]

MINUTES OF THE COURT—OCT. 5, 1953

Present: The Hon. Ben Harrison,  
District Judge.

Counsel for Plaintiffs: Bernard Reich.

Counsel for Defendants: Guy Knupp for  
def't RKO Radio Pictures Corp.  
J. J. Brandlin for Harry and Gertrude  
Rosenthal.

## Proceedings:

For hearing (1) motion of plaintiffs to vacate the order of dismissal, dated June 26, 1953, pursuant to motion, notice, memo. of points and authorities, filed Aug. 17, 1953, and affidavit of Bernard Reich, filed Sept. 10, 1953; (2) motion of Raymond A. Cook, Esq., to appear as amicus curiae, filed Sept. 21, 1953.

Raymond A. Cook, Esq., who is present, makes a statement, re motion (2).

The Court makes a statement and Orders motion (2) Denied.

Attorney Reich makes a statement in support of motion (1) of plaintiffs to vacate the order of dismissal.

Court Orders said motion Granted; Counsel to prepare and present appropriate order for signature.

EDMUND L. SMITH,  
Clerk.

By MURRAY E. WIRE,  
Deputy Clerk. [183]

In the United States District Court, Southern District of California, Central Division

No. 14848-BH

ELI B. CASTLEMAN, et al.,

Plaintiffs,

vs.

HOWARD R. HUGHES, et al.,

Defendants,

HARRY ROSENTHAL and GERTRUDE ROSENTHAL,

Applicants for Intervention.

NOTICE OF CROSS-MOTION AND MOTION  
FOR CERTAIN RELIEF, ETC.

To the Defendant RKO Radio Pictures, Inc., and Mitchell, Silberberg & Knupp, Esqs., and Roy W. McDonald, Its Attorneys, and to Harry Rosenthal and Gertrude Rosenthal, Applicants for Intervention, and Their Attorneys, Vaughan and Brandlin, Esqs., and to Bernard Reich, Esq.

You and Each of You Will Please Take Notice that the plaintiffs in the above-entitled action will cross-move this Court on October 19, 1953, at 10:00 a.m., or as soon thereafter as counsel can be heard, in Courtroom 8 of the above-entitled Court, located in the United States Post Office and Courthouse Building, Los Angeles 13, California, for an order: [239]

A. Staying consideration of the motion of the said Harry Rosenthal and Gertrude Rosenthal to intervene and become parties plaintiff herein until after the completion of the taking of their depositions contemporaneously noticed herewith unless this Court in the meantime shall have denied their application on the grounds hereinafter set forth; and plaintiffs, further, will move this Court for an order:

B. Enjoining the said Bernard Reich, Esq., from taking any further steps in this case as alleged counsel for the plaintiffs;

C. Substituting Henry Herzbrun, Esq., for the said Bernard Reich, Esq., as local attorney of record for the plaintiffs herein;

D. Admitting Louis Kipnis of the New York Bar, pro hac vice, and designating said Louis Kipnis, Esq., as lead counsel for the plaintiffs herein in the above-entitled action;

E. Quashing the notice, dated October 5, 1953, heretofore served by the said Bernard Reich, Esq., to take the depositions of Howard Hughes and Ross Hastings as officers and/or employees of the defendants, RKO Pictures Corporation and RKO Radio Pictures, Inc., and

F. Granting such other and different relief as to the Court may seem just in the premises.

Said cross-motion "A" as to applicants for intervention, will be made upon the following grounds:

1. The proposed intervenors, Harry Rosenthal and Gertrude Rosenthal, do not appear to be stock-

holders of record on the stock book of RKO Pictures Corporation.

2. The proposed pleading does not comply with the requirements of Rule 24 of the Federal Rules of Civil Procedure. [240]

3. The proposed pleading does not present any new issues which present common questions of law and fact.

4. The proposed intervention will prejudice the adjudication of the rights of the original parties.

5. The application for intervention is not timely made and the proposed intervenors are guilty of laches.

As to the affirmative portion of plaintiffs' motion "B," relating to enjoining Bernard Reich, it will be made on the following grounds:

1. All prior authority granted to Bernard Reich of any kind, to act for plaintiffs, was revoked by letter dated May 7th, 1953.

2. A stipulation of substitution of attorneys signed by the plaintiffs, Mr. Kipnis and Mr. Herzbrun, was submitted to Mr. Reich providing for voluntary substitution but Mr. Reich refused to sign the same until his fees were secured outside of the instant case.

3. Said stipulation of substitution was forwarded on Reich's own suggestion.

4. Unless restrained from proceeding without authority, Mr. Reich will impose liability on the

plaintiffs for stenographic and other costs against their will.

5. Unless restrained, Mr. Reich, by proceeding unilaterally and without authority, will impair and impede the rights of the plaintiffs and afford defendants an opportunity to delay the litigation by claiming doubt as to the identity of proper counsel herein.

As to the affirmative portion of plaintiff's motion "C," relative to substituting Henry Herzbrun, it will be made on the following grounds:

1. There is incorporated by reference all the grounds set forth in the preceding portion of the motion as if [241] herein fully and at length set forth.

As to the affirmative portion of plaintiff's motion "D," relative to admitting Louis Kipnis of the New York Bar, pro hac vice, to the Bar of this Court and naming him lead counsel, it will be made on the following grounds:

1. The only convention relationship of attorney and client is that which exists between Louis Kipnis and plaintiffs.

2. Louis Kipnis and Leo B. Mittelman of the New York Bar and the accounting firm of David Berdon & Co. have devoted over a year of concentrated time, effort and study to the prosecution of the derivative lawsuit for the benefit of RKO Radio Pictures and RKO Pictures Corporation; they have

examined thousands of documents, have conducted extensive examinations before trial of seventeen witnesses whose testimony transcribed is approximately 1,100, pages long.

3. Messrs. Kipnis and Mittelman and Mr. Rosner of the accounting firm of David Berdon & Co., have examined every possible item of information, traced every rumor and investigated every report in the prosecution of this case.

4. Messrs. Kipnis and Mittelman and the accounting firm of David Berdon & Co., have had many years of experience in the prosecution of derivative stockholders' suits and are qualified by experience to prosecute the claims herein.

5. Messrs. Kipnis and Mittelman, as attorneys for the plaintiffs herein, commenced the first suit on the within subject matter in New York, in California, and in Nevada and are first in all jurisdictions including Nevada, where the case is ready for trial.

6. Unless lead counsel is appointed, then there may arise, as there has in this case, conflicts of methods [242] of procedure to the detriment of the prosecution of the claims and the prejudice of the rights of all stockholders similarly situated.

As to the affirmative portion of plaintiffs' motion "E," relative to quashing the notice served by Bernard Reich, it will be made on the following grounds:

1. There is incorporated by reference all of the grounds set forth in the preceding portion of the motion.

2. Unless this notice is quashed, it might interfere with the taking of the deposition of Mr. Hughes now scheduled to be taken on October 12 by Mr. Kipnis, in Nevada.

3. Unless quashed, said scheduled examination will impose a liability on the plaintiffs for stenographic costs which they have neither authorized nor desire and in view of the scheduled examination of Mr. Hughes in the Nevada case, will be wasteful, duplicative and harassing.

As to the affirmative part of plaintiffs' motion "F," relating to such other and different relief as to the court may seem just in the premises, it will be made on the following grounds:

1. Mr. Reich should be barred from any participation in this or any other derivative suit for or on behalf of RKO on the grounds of possible conflict of interest.

2. The conflict of interest referred to arises from the appearance, as of court, by Mr. Reich as attorney for plaintiffs in litigation seeking the recovery of large sums of money from RKO Radio Pictures, Inc., and RKO Pictures Corporation as adversary parties for alleged violation of anti-trust laws.

3. There has been generated ill feeling between Mr. Reich and Messrs. Kipnis and Mittelman and,

rather than [243] avoiding personalities, Mr. Reich has alluded unfairly to Messrs. Kipnis and Mittelman including issuing press releases about them and this Court.

4. Unless Mr. Reich is barred from appearing in any capacity allegedly on behalf of RKO Pictures Corporation, the rights of the shareholders of RKO Pictures Corporation will be jeopardized.

This motion is based upon the records, papers and files in the above action and upon affidavits and evidence to be hereafter filed and introduced.

Dated: October . . . , 1953.

/s/ HENRY HERZBRUN,  
Attorney for Plaintiffs.

Good Cause Appearing to the Court Therefor,

It Is Hereby Ordered that service of the foregoing Notice of Motion shall be sufficient, if served on or before October 13, 1953, and filed herein on or before said 13th day of October, 1953.

Dated: October 13, 1953.

/s/ BEN HARRISON,  
Judge.

[Endorsed]: Filed October 13, 1953. [244]

[Title of District Court and Cause.]

REASONS AND MEMORANDUM IN OPPOSITION TO NOTICE OF CROSS-MOTION FOR CERTAIN RELIEF BY HENRY HERZBRUN, LOUIS KIPNIS AND LEO B. MITTELMAN

Preliminary Statement

On October 4, 1953, the undersigned received in the mail documents entitled "Notice of Cross-Motion and Motion for Certain Relief, Etc." and "Points and Authorities in Support of Cross-Motion and Motion for Certain Relief."

The motion is subscribed by Henry Herzbrun purporting to be attorney for plaintiffs. Mr. Herzbrun is not attorney for the plaintiffs, no substitution having been accomplished either pursuant to Local Rule 1 or in any other wise under law.

The motions themselves consist of six pages; the points and authorities consist of three pages. The motion is returnable [248] October 19, 1953, and no cause is shown by affidavit or otherwise why the undersigned was not entitled to ten days by personal service and thirteen days' service by mail. Incidentally, counsel has his office less than one block from the undersigned; yet, service was made by mail so as to be received October 14, 1953 (five days before the return date with an intervening week end) and not October 13th as specified in the Order Shortening Time.

The notice of motion states that the motion is based upon the records, papers and files in the action and "upon affidavits and evidence to be hereafter filed and introduced."

Notwithstanding Local Rule 3, subdivision (d), no affidavit required or permitted by Rule 6 (d) FRCP was filed with the notice of motion; no permission to file such affidavit has been granted; and it is clear that the filing of the affidavits will not be served in time for the hearing of the motion on the return date October 19, 1953.

The undersigned respectfully incorporates by reference on this motion his affidavits heretofore filed as follows:

1. Affidavit of Bernard Reich in Support of Motion to Vacate Order of Dismissal, sworn to September 9, 1953.

2. Reply Affidavit of Bernard Reich in Opposition to Motion and Affidavit of Raymond A. Cook as Amicus Curiae, sworn to October 2, 1953.

3. Reply Affidavit of Bernard Reich to Affidavit of Louis Kipnis and Leo B. Mittelman, sworn to October 1, 1953.

4. Reply Affidavit of Bernard Reich to Affidavit of Roy W. McDonald, sworn to October 2, 1953.

Actually there are several motions as follows:

- (a) Staying consideration of the motion of [249] the Rosenthals to intervene pending the taking of

their depositions allegedly contemporaneously noticed.

(b) Enjoining Bernard Reich from taking any further steps in this case as counsel for plaintiffs.

(c) Substituting Henry Herzbrun for Bernard Reich as local attorney of record for the plaintiffs.

(d) Admitting Louis Kipnis to this Court and designating Louis Kipnis as lead counsel in this action.

(e) Quashing the notice to take the depositions noticed by Bernard Reich.

(f) Granting other and different relief.

### Reasons in Opposition

1. Proposed counsel for plaintiffs has no standing in this action; his said motions are therefore null and void.

2. The moving papers do not establish good cause or any cause for shortening the time of service.

3. Service of the moving papers was insufficient.

4. The moving papers are insufficient.

5. The undersigned local attorney of record has not been served with any notice of the taking of the depositions of the Rosenthals and no authority is shown for the taking of their depositions by the purported attorney for the plaintiffs.

6. There is no competent evidence justifying en-

joining Bernard Reich from proceeding in this action.

7. There is no proper application by the plaintiffs for the substitution of proposed counsel for said Bernard Reich. [250]

8. There is no proper application for the admitting of Louis Kipnis as a member of this bar.

9. There is no proper application for designating Louis Kipnis as lead counsel; and, furthermore, to appoint Louis Kipnis lead counsel would be to hand over control of the case to an out-of-state attorney who has indicated his intention not to prosecute this action; and, furthermore, lead counsel must be a local attorney over whom the Court can exercise full control.

10. There is no authority for the purported attorney for the plaintiffs to quash a notice of deposition served by the local attorney of record for the plaintiffs, Bernard Reich.

11. Justice requires that the motions be denied; or in the alternative continued; or in the alternative that a special Master be appointed to undertake an investigation and inquiry into the conduct of the parties and their attorneys, including the undersigned; or in the alternative that a Special Master be appointed to fix the fees and costs of the undersigned.

#### General Argument

The undersigned does not oppose the intervention by applicants for intervention, Harry Rosenthal and

Gertrude Rosenthal. This alone should establish the fact that the undersigned's sole interest is not fees. The record will show that the undersigned has up to now fought unaided to uphold the integrity of the local bar and bench.

The undersigned admits that he has not followed the instructions of New York counsel. The record shows and will show, if the undersigned is called upon to give further [251] evidence, that the reason for his disobedience was not just a disagreement among counsel as to procedure, but because the undersigned has evidence of collusion between the New York attorneys for the plaintiffs and the defendants.

The undersigned maintains and will continue to maintain that his duty to this Court and to the class of stockholders which he represents transcends his duty to his out-of-state correspondents.

The undersigned would like to obtain compensation for his services; but this desire has always been secondary as the record will show. And no amount of money will compensate him for the lonely, lonely fight for justice and right which he has been fighting.

Howard Hughes is a very rich and powerful man. His attorneys, both in New York and in California, are most resourceful. If this were not enough to stop a young attorney, Mr. Hughes and his attorneys have had the help of plaintiffs' New York attorneys.

There is much evidence which the undersigned can give but which perhaps he may not out of duty to the stockholders he represents. He therefore has had to take much abuse without fighting back.

The undersigned has been approached by other stockholders to represent them; but so far has not accepted retainers pending consultation with the Court.

The record shows that Mr. Kipnis does not intend to prosecute this action. The record shows that proposed counsel is a willing agent of Mr. Kipnis. Assuming, therefore, even a proper application for substitution, how can this Court substitute this counsel for Mr. Reich, admit Mr. Kipnis and appoint him lead counsel? How could this protect the [252] rights of the stockholders in the face of the allegation that notwithstanding this action was filed prior to the Nevada action, and is in the federal court on the undersigned's insistence, Mr. Kipnis insists on prosecuting the Nevada action in a state court under the circumstances related in the affidavits?

The undersigned does not insist that this Court try this case. He asks that the Court retain jurisdiction with instructions to the undersigned to report to the Court with respect to the proceedings in New York and in Nevada.

As to the substitution of the undersigned: this is a class action; the undersigned represents not just these plaintiffs but all of the stockholders. It is

respectfully submitted that the Court has the authority and power to do any of the following:

1. Deny the motions herein in all respects.
2. Continue the motions for a sufficient period of time to allow proper inquiry.
3. Appoint a Special Master to take testimony on all issues.
4. To allow Bernard Reich to appear for other stockholders.
5. On proper application to allow the substitution on condition that Mr. Reich receive the reasonable value of his services, together with his costs.
6. Appoint a Special Master to take testimony on the last mentioned issue. [253]

### Points and Authorities

I. Henry Herzbrun Has No Standing in This Action; His Said Motions Are Therefore Null and Void.

Local Rule 1 (e) (2), (3).

II. The Moving Papers Do Not Establish Good Cause or Any Cause for Shortening the Time of Service.

III. Service of the Moving Papers Was Insufficient.

See Preliminary Statement, *supra*.

IV. The Moving Papers Are Insufficient.

See Preliminary Statement, *supra*.

V. The Undersigned Local Attorney of Record Has Not Been Served With Any Notice of the Taking of the Depositions of the Rosenthals and No Authority Is Shown for the Taking of Their Depositions by the Proposed Attorneys for the [254] Plaintiffs.

VI. There Is No Competent Evidence Justifying Enjoining Bernard Reich From Proceeding in This Action.

Since affidavits have not accompanied the motions, and since the only evidence on file by affidavits on both sides indicates that the New York attorneys are acting contrary to the interest of the plaintiffs and all the stockholders, there is no evidence which would justify the issuance of an injunction.

Moreover should an injunction be issued, the applicant must give security pursuant to Rule 65, subdivision (c) of the Federal Rules of Civil Procedure.

VII. There Is No Proper Application by the Plaintiffs for the Substitution of Proposed Counsel for Bernard Reich.

Local Rule 1 (e) (2), (3).

The motion for substitution is made by Henry Herzbrun of the local bar and Louis Kipnis and Leo B. Mittelman of the New York bar. Henry Herzbrun is not yet the attorney for the plaintiffs. Messrs. Kipnis and Mittelman are not even admitted to this bar.

There is therefore no application by the plaintiffs themselves by way of affidavit or otherwise.

VIII. The Is No Proper Application for the Admitting of Louis Kipnis as a Member of This Bar.

Local Rule 1 (d). [255]

IX. There Is No Proper Application for Designating Louis Kipnis as Lead Counsel; And, Furthermore, to Appoint Louis Kipnis Lead Counsel Would Be to Hand Over Control of the Case to an Out-of-State Attorney Who Has Indicated His Intention Not to Prosecute This Action; And, Furthermore, Lead Counsel Must Be a Local Attorney Over Whom the Court Can Exercise Full Control.

Local Rule 1 (d); see General Argument, *supra*; see Affidavits on file on Motion to Vacate Dismissal Granted October 5, 1953.

X. There Is No Authority for the Proposed Attorney for the Plaintiffs to Quash a Notice of Deposition Served by the Local Attorney of Record for the Plaintiffs, Bernard Reich.

Local Rule 1 (3).

XI. Justice Requires That the Motions Be Denied; or in the Alternative Continued; or in the Alternative That a Special Master Be Appointed to Undertake an Investigation and Inquiry Into the Conduct of All Parties and Their Counsel; or in the Alternative That a Special Master Be Appointed to Fix the Fees and Costs of Bernard Reich.

See General Argument; *supra*; see Affidavits on Motion to Vacate Dismissal Granted October 5, 1953; [256]

See Point IV, Page 5, of Plaintiffs' "Memorandum of Points and Authorities in Support of Motion to Vacate Order of Dismissal Dated June 26, 1953," filed on or about August 17, 1953.

On the issue of fees see:

John Griffiths & Son Co. vs. United States, 72 F.(2d) 466, 468 (CCA 7, 1934);

Ingold vs. Ingold, 30 F. Supp. 347, 348 (DC SD N.Y. 1939);

6 Cal. Jur. (2d) 369, Attys § 176.

In the Griffiths case, *supra*, the circuit court stated:

"Complaint is made as to the character of the proceedings. Admittedly, where an attorney is employed upon a contingent fee and the clients desire to terminate the relations, the proper practice is to set a motion for substitution of counsel down for a hearing, notify the attorney of record of the motion, ascertain all that is due and owing him by reason of his services and expenses, and provide for the payment of his compensation, as a condition precedent to the allowance of the order of substitution."

In the Ingold case, *supra*, the court stated:

"This action, which involves a considerable sum

of money, was discontinued after issue joined, by the plaintiff and defendant entering into a stipulation, in and by which they consented to the dismissal of the action. The action is based upon contract; the stipulation was made and entered [257] into and signed by the plaintiff without the knowledge or consent of her attorney, and made and entered into by the defendant with knowledge, either actual or constructive, that the plaintiff's attorney had an interest in the lawsuit by way of his fee.

“True, the plaintiff did discharge her attorney at or about the time of the signing of the stipulation of discontinuance, and the client has a right to discharge her attorney, where he is hired on a contract, his payment to be a contingent fee, any time before the contract, by its terms is to expire, but the client is liable for the services rendered if the discharge is wrongful. *E. Chase Crowley vs. Laura A. Wolf*, 281 N.Y. 59, 22 N.E.2d 234, decided July 11, 1939.

\* \* \*

“The pertinent part of Rule 41 of the Federal Rules of Civil Procedure, 28 U.S.C.A. following section 723c, namely, Rule 41(a) (1), was never intended as a cloak whereby a client might settle or discontinue a lawsuit, and disregard entirely the interest of the attorney in the lawsuit. As a matter of fact, Rule 41 was intended for the purpose of setting forth and curbing the right of a plaintiff to discontinue actions, and simplify a practice which heretofore has never been clearly outlined.”

Conclusion

Justice in law and in equity requires the denial of the cross-motions in all respects. [258]

In the alternative the cross-motions should be continued pending further investigation and inquiry by a Special Master or perhaps by an Amicus.

Dated: October 16, 1953.

/s/ BERNARD REICH,  
Attorney for Plaintiffs.

[Endorsed]: Filed October 16, 1953. [259]

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[Title of District Court and Cause.]

MOTION FOR APPOINTMENT OF SPECIAL  
MASTER PURSUANT TO RULE 53 OF  
FEDERAL RULES OF CIVIL PROCEDURE

Comes Now the undersigned, attorney of record for the plaintiffs, and makes this motion, as originally requested in Memorandum dated October 16, 1953, for the appointment of a Special Master with maximum powers, all in accordance with Rule 53 of the Federal Rules of Civil Procedure, to investigate, receive and report all evidence, and make findings concerning all matters before this Court in this action now pending and continued to December 28, 1953, including but not limited to the facts and circumstances of the submission of the defendants Howard R. Hughes, RKO Pictures Corporation and

RKO Radio Pictures, Inc., to the jurisdiction of the Nevada State Court, of the plaintiffs' default on defendant Hughes' motion to quash service, and of the dismissal of this action (later vacated [281] by this Court) on June 26, 1953.

Dated: November 12, 1953.

/s/ BERNARD REICH,  
Attorney for Plaintiffs.

[Endorsed]: Filed November 16, 1953. [282]

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[Title of District Court and Cause.]

AFFIDAVIT OF BERNARD REICH IN SUP-  
PORT OF MOTION FOR THE APPOINT-  
MENT OF A SPECIAL MASTER UNDER  
RULE 53 OF THE FEDERAL RULES OF  
CIVIL PROCEDURE

State of California,  
County of Los Angeles—ss.

Bernard Reich being first duly sworn, deposes and says:

1. I am local attorney of record for the plaintiffs.
2. I make this affidavit in support of the motion herein for the appointment of a Special Master in accordance with Rule 53 of the Federal Rules of Civil Procedure.

3. I am informed by the local trade papers, Daily Variety and Hollywood Reporter, that on November 10, 1953, the New York Supreme Court, by Honorable Justice S. Samuel Di Falco, in a minority stockholders' action against some of the defendants herein filed subsequent to the instant suit, appointed a Referee to determine whether the New York action should be stayed [285] pending trial of a similar action brought in Las Vegas, Nevada by the same plaintiffs as in this action, likewise filed after the instant action.

4. I am informed by way of the Hollywood Reporter dated November 11, 1953, pages 1 and 7 thereof, that Judge Di Falco stated:

“ ‘The record thus far before me is very persuasive that the Nevada jurisdiction was selected by defendant Hughes.’ ”

\* \* \*

“the history of the Castleman suits, said that attorneys for Castleman evidently have abandoned the California suit and are in dispute with their legal counsel in California (Bernard Reich) concerning the status of the litigation there.”

5. In a document entitled “Reasons and Memorandum in Opposition to Notice of Cross-Motions for Certain Relief, Etc.,” dated October 16, 1953, I requested the appointment of a Special Master to undertake an investigation and inquiry into the conduct of all parties and their counsel.

6. I was informed by a New York attorney that

at least some of my affidavits here in California were used before Judge Di Falco in New York.

7. There is now pending before this Court to be heard on December 28, 1953, among other things, the following:

(a) Motion of defendant RKO Radio Pictures, Inc., for order dismissing the above-entitled action, or in the alternative for an order staying all proceedings in said action.

(b) Motion for an order that depositions be not taken. [286]

(c) Cross-motion of the New York lawyers for the plaintiffs to enjoin Bernard Reich from taking any further steps in this case as counsel for plaintiffs.

(d) Cross-motion by said New York counsel to substitute Henry Herzbrun (now deceased) for Bernard Reich as local attorney of record for the plaintiffs.

(e) Cross-motion to admit Louis Kipnis to this Court and designating Mr. Kipnis as lead counsel in this action.

(f) Cross-motion by New York attorneys to quash the notice of depositions noticed by Bernard Reich.

8. I respectfully incorporate by reference all of my affidavits heretofore made and on file, including:

(a) Affidavit of Bernard Reich in Support of

Motion to Vacate Order of Dismissal, sworn to September 9, 1953.

(b) Reply Affidavit of Bernard Reich in Opposition to Motion and Affidavit of Raymond A. Cook as Amicus Curiae, sworn to October 2, 1953.

(c) Reply Affidavit of Bernard Reich to Affidavit of Louis Kipnis and Leo B. Mittelman, sworn to October 1, 1953.

(d) Reply Affidavit of Bernard Reich to Affidavit of Roy W. McDonald, sworn to October 2, 1953.

9. I charge the defendants and plaintiffs' New York counsel with collusion in submitting the action to the Nevada Court. [287]

10. I charge New York counsel with failing to truly represent the stockholders of RKO in that the proceedings in Nevada are not truly adversary.

11. I charge the defendant Howard R. Hughes with removing himself from this jurisdiction and to Las Vegas, Nevada, after the commencement of this action and before the commencement of the Nevada action as part and parcel of a plan to deprive this Court of jurisdiction and to confer jurisdiction to the State of Nevada.

12. I charge New York counsel with the responsibility of plaintiffs' default on Mr. Hughes' motion to quash service on him, also as part and parcel of the plan and determination to deprive this Court

of jurisdiction and to confer jurisdiction on the Nevada Court.

13. I charge defendants, plaintiffs' New York counsel, and others with a plan, scheme and determination to abandon the California action, to have it dismissed without my knowledge and consent, and as part of the over-all plan to deprive this Court of jurisdiction.

14. I charge the defendants and plaintiffs' New York counsel with complete disinterest and indifference to the rights and interests of the thousands of stockholders of RKO. In this connection and solely for the purpose of indicating to this Court the need of the stockholders to protection, I quote from the stock report of October 20, 1953, of Standard & Poor's Corporation, as follows:

"RKO Pictures

"Stock—Common.....

"Approx. Price:  $2\frac{3}{4}$ .

"Dividend: None.

"Yield: None.

"Recommendation: This company came into being in its present form on January 1, 1951, when, under the terms of a consent decree, old RKO separated its picture making from its theatre [288] operations. Except for the war years, the company's pro-forma past record has been dismal, and its future is uncertain. The shares are not a suitable holding for the average investor and can be held only as an outright speculation."

15. As to my position I quote from the transcript of the proceedings before this Court on October 19, 1953, page 14, lines 18 to 20 thereof, as follows:

“Mr. Reich: I will stipulate that my fees may be small. I will stipulate you don’t have to fix fees at all.

“The Court: You don’t have to so stipulate.”

16. I would summarize the situation as follows: The first action was commenced in New York by plaintiffs’ New York counsel. They have however virtually abandoned this action.

The second action was filed by me in this Court on December 15, 1952.

The third action was filed by plaintiffs’ New York counsel in Las Vegas, Nevada, without my knowledge or consent. That action is set for trial for January 4, 1954. According to the defendants and plaintiffs’ New York counsel, prior to October 19, 1953, 17 depositions were taken in this complicated case numbering in all only about 1,100 pages. It is true that the Nevada action has proceeded swiftly, but I charge this to be part and parcel of the plan already referred to.

The next action was filed in New York by other stockholders, and it is in that action and on a motion to stay that action, that Judge Di Faleo ordered an investigation. [289]

I am an attorney also admitted to practice in the State of New York. I aver that the New York action cannot be tried before the Nevada action and

will probably be tried no sooner than the Fall of 1954.

Judge Di Falco denied the petition to dissolve RKO. The New York Court has no effective jurisdiction of or even visitorial powers over the RKO companies and has absolutely no jurisdiction over Mr. Hughes.

On the other hand this Court has jurisdiction to dissolve the local RKO defendant and/or to appoint a receiver for its assets.

If my charges regarding Mr. Hughes are sustained this Court has jurisdiction over the defendant Hughes. Furthermore, I am informed and therefore allege on information and belief that Mr. Hughes has substantial assets in the State of California and within the jurisdiction of this Court so that he may be brought in by way of attachment of those assets.

The facts and incidents alleged in the amended complaint herein took place for the most part within this district of the Court. The books and records of the corporation are here. Most of the 17 witnesses whose depositions were taken in the Nevada action are residents of California.

This Court is in the best position to protect the interests of the stockholders.

19. On October 14, 1953, I wrote Honorable Frank McNamee, Judge, Eighth Judicial District, Las Vegas, Nevada, as follows:

“October 14, 1953.

“Honorable Frank McNamee, Judge,

“Eighth Judicial District,

“Court of Nevada,

“Las Vegas, Nevada. [290]

“Re: Castleman v. RKO, et al.,

Nevada Case No. 59422;

Castleman, et al., v. Hughes, et al.,

U.S.D.C. SD Cal. 14848-BH.

“Honorable Sir:

“I am California attorney for the plaintiffs in the California action, the plaintiffs being the same apparently as in the action before you.

“I have caused the file before you to be checked and but recently have noted letter on the stationery of Hughes Tool Company, Houston, Texas, addressed to you under date of May 4, 1953, and signed by T. A. Slack, Vice President and general counsel of Hughes Tool Company; also letter from attorney Louis Kipnis of New York for the plaintiffs addressed to you under date of May 11, 1953.

“My duty to the stockholders of RKO compels me to bring certain facts to your attention and to invite an appropriate inquiry. By so doing I have no intention of arguing the matter on the merits to you or to transfer jurisdiction from California to Nevada. I am sending a copy of this letter to various attorneys and persons indicated in Mr.

Slack's letter, although no copy of Mr. Slack's letter or Mr. Kipnis' letter was sent to me.

"The facts then briefly are as follows:

"Plaintiffs, by their attorney, Louis Kipnis, originally filed a minority stockholders' action in the Supreme Court of the State of New York in and for the County of New York, bearing number 14431-1952.

"Thereafter the same plaintiffs, through their New York attorney or attorneys retained me to file a similar action in the California courts. Upon my insistence the action was filed in the federal court and bears number 14848-BH. The original complaint [291] was filed on December 15, 1952.

"Thereafter plaintiffs' New York attorney withdrew in New York petition for a receivership under the circumstances recited in Exhibit 'A' to my affidavit made September 9, 1953, and filed in the Los Angeles Federal Court, a copy of which affidavit, among others, is enclosed herewith.

"The withdrawal of the petition for a receivership was done without my knowledge, as was the filing of the suit before your Court.

"The letters addressed to you dated respectively May 4, 1953, and May 11, 1953, were sent to you after I raised the question with my New York correspondents of the jurisdiction of your Court.

"It is not denied in any of the papers filed in the Federal Court here in Los Angeles that Mr. Hughes was a resident of the State of California when I filed the action on December 15, 1952.

“It is not denied that Mr. Hughes removed his residence to Las Vegas, Nevada, after the conference among the attorneys at Mr. Odium’s ranch in Indio, California, described in part in Mr. Slack’s letter of May 4, 1953.

“On or about March 4, 1953, I filed in the Federal Court here plaintiffs’ Amended Complaint which widened considerably the issues first presented by the complaint. I am informed that the complaint before you is similar to the original complaint here and has not been amended to reflect the issues presented by the amended complaint here.

“I then noticed the deposition of Mr. Hughes and was prepared to oppose (1) a motion by the defendant RKO for a security bond under the California State Law, and (2) a motion by the defendant Hughes to quash service of process on him. I was at first thwarted in this effort by the defendants acting in [292] concert with my New York correspondents.

“On June 26, 1953, my New York correspondents and counsel for the defendants succeeded in having entered an order which dismissed the action in California against all defendants; and notwithstanding the minute order of the Court and its rules, the proposed order was never served on me either before or after it was made by Honorable Ben Harrison, District Judge.

“On October 5, 1953, Judge Harrison granted my motion to vacate the invalid order made on June 26, 1953, in the following language:

“ ‘Court orders said motion granted. Counsel to prepare and present appropriate order for signature.’

“The above is the briefest of summaries. Enclosed herewith are copies of the papers filed before Judge Harrison and which, I submit, present a situation requiring inquiry from your Honor :

“1. Motion to Vacate Order of Dismissal, dated June 26, 1953.

“2. Notice of Hearing.

“3. Memorandum of Points and Authorities in Support of Motion to Vacate Order of Dismissal, dated June 26, 1953.

“4. Affidavit of Bernard Reich in Support of Motion to Vacate Order of Dismissal, sworn to September 9, 1953.

“5. Motion to Appear as Amicus Curiae and Affidavit of Raymond A. Cook in Support Thereof, sworn to September 18, 1953.

“6. Reply Affidavit of Bernard Reich in Opposition to Motion and Affidavit of Raymond A. Cook as Amicus Curiae, sworn to October 2, 1953.

“7. Affidavit of Louis Kipnis and Leo B. Mittelman in Opposition to Motion to Vacate Order of Dismissal, made June 26, [293] 1953, sworn to September 25, 1953.

“8. Reply Affidavit of Bernard Reich to Affi-

davit of Louis Kipnis and Leo B. Mittelman, sworn to October 1, 1953.

“9. Affidavit of Roy W. McDonald, sworn to September 25, 1953.

“10. Reply Affidavit of Bernard Reich to Affidavit of Roy W. McDonald, sworn to October 2, 1953.

“In addition I enclose a copy of the Amended Complaint filed here in the Federal Court.

“I was not present at the Cochran Ranch conference described in part by Mr. Slack in his letter addressed to your Honor, dated May 4, 1953. I learned of the conference after it was held. In his affidavit filed here, Mr. McDonald stated (pages 2 and 3) that he was informed that Mr. Hughes resides in Nevada and therefore he thought it for the best interests of the corporations who do no business in Nevada that they submit to the jurisdiction in which Mr. Hughes resides.

“In my reply affidavit (pages 1 and 2), which was one of the affidavits upon which Judge Harrison acted on October 5, 1953, I point out that Mr. McDonald does not state when Mr. Hughes removed his residence from California to Nevada; nor does he give any reason why all the parties could not appear in California where the actions and transactions complained about took place, and where the witnesses reside and where the pertinent books and records are located. The fact is that Mr.

Hughes removed himself to Nevada after the California action was filed.

“The fact is, furthermore, that the California action was filed before the Nevada action.

“The fact is, furthermore, that Nevada does not have any security law. [294]

“Why then should the defendants submit to a jurisdiction where they do not have the benefit of a security law? And why then should corporations who do no business in Nevada submit to the jurisdiction of that state?

“I submit to your Honor that the circumstances of these actions in New York, California and Nevada require careful scrutiny.

“I do not wish to minimize my dilemma. I owe a duty to the clients who have retained me. However, I believe I owe a higher duty to the courts of California and Nevada, and to the stockholders who constitute the class which I represent in California.

“My only interest is to fulfill my obligation to the courts and to the stockholders. That obligation compels me to make sure that the action before your Honor is truly adversary.

“I suggest that your Honor appoint a Special Master or Referee to investigate the circumstances surrounding the submission by the parties to the jurisdiction of your Court. I pledge my whole-

hearted cooperation within the limitations of my duty to all concerned.

“Respectfully yours,

“/s/ BERNARD REICH.

“Encls.

“CC: Louis Kipnis, Esq.,  
George S. Leisure, Esq.,  
Floyd B. Odum,  
Woodburn, Forman & Woodburn,  
T. A. Slack, Esq.”

20. On or about October 17, 1953, Mr. Hughes' California and Nevada attorneys noticed a motion for a hearing on my letter of October 14, 1953, in Las Vegas, Nevada, all as set forth in Exhibit “A” attached hereto and made a part hereof. [295]

21. On October 21, 1953, I wrote defendant Hughes' Nevada attorneys as follows:

“October 21, 1953.

“Woodburn, Forman & Woodburn,  
“206 N. Virginia Street,  
“Reno, Nevada.

“Re: Castleman v. Walker, et al.,  
Nevada Case No. 59422;

Castleman v. RKO Pictures Corpora-  
tion, et al.,

New York Case No. 14431-1952;

Castleman, et al., v. Hughes, et al.,

California Case No. 14848-BH.

“Gentlemen:

“Yesterday I received in the mail your letter and Notice of Motion re hearing in Las Vegas, Nevada, on October 27, 1953.

“Today I received in the mail copy of Mr. Roy W. McDonald’s letter to Judge McNamee, dated October 19, 1953.

“In your Notice of Motion you state that I am beyond the jurisdiction of the Nevada Court and have not unequivocally agreed to bring myself within the jurisdiction of the Court.

“How would you have me submit myself to your jurisdiction? Will you stipulate to my coming in to your Court Amicus and/or would you consent to intervention by me or in behalf of the stockholders?

So far as I am permitted I do not oppose your motion that the Court fix a date for hearing.

“I would ask only that a Special Master or Referee be appointed to conduct the investigation in Nevada, California, and New York.

“I would also like to be apprised of the rules of the investigation as to who shall have the right to examine and cross-examine. [296]

“I would propose that in addition to myself, testimony be taken from the following witnesses:

“1. All those present at the Cochran Ranch conference.

“2. Roy W. McDonald.

“3. T. A. Slack.

"4. Louis Kipnis.

"5. Leo B. Mittelman.

"6. George S. Leisure.

"7. Floyd B. Odium.

"I would ask also that Judge Henry Clay Greenberg of the New York Supreme Court be informed of the pending proceedings.

"Very truly yours,

"/s/ BERNARD REICH.

"P.S. Inasmuch as I had your firm's name only from the letter of Mr. Slack to Judge McNamee, dated May 4, 1953, I assumed that your office was located in Vegas. My previous letter, therefore, came back with a notation 'insufficient address.'

"P.P.S. Please forgive me for having my secretary sign my name to this letter as I am dictating the letter away from the office.

"BR.

"cc: Honorable Frank McNamee, Judge.

(For Filing.)

Honorable Ben Harrison, Judge U. S. District Court. (For Filing.)

T. A. Slack, Esq.

Louis Kipnis, Esq.

Donovan, Leisure, Newton & Irvine, Esqs.

Floyd B. Odium, Esq."

22. On October 23, 1953, I wrote Judge McNamee as follows: [297]

“October 23, 1953.

“Air Mail,

“Special Delivery.

“Honorable Frank McNamee, Judge,

“Eighth Judicial District Court,

“County Courthouse,

“Las Vegas, Nevada.

“Re: Castleman v. Walker, et al.,

Case No. 59422.

“Dear Judge McNamee:

“I have received a copy of Mr. McDonald’s letter to your Honor, dated October 19, 1953.

“In his letter Mr. McDonald assumes that I will appear for ‘such a hearing,’ give testimony, and submit myself ‘for proper cross-examination.’ May I inquire of him through the Court whether he will submit to proper cross-examination. After all, as he says, it is I who criticized counsel and the parties. It is I who called for the investigation into the circumstances of the submission of this cause to the Nevada Court. I did not submit the cause, however.

“I too have evidence which I propose to give to the Court when the Inquiry is set up. However, I do not propose to have counsel conduct the investigation or divert the investigation from its proper course.

“It now occurs to me that in addition to the witnesses suggested in my letter (October 21) to the moving parties’ counsel, the following additional witnesses should be examined: All of the defendants, including Howard R. Hughes.

“In connection with Mr. Hughes, I stated in my letter to your Honor, dated October 14th:

“ ‘It is not denied in any of the papers filed in the Federal Court here in Los Angeles that Mr. Hughes was a resident of the State of California when I filed [298] the action on December 15, 1952.

“ ‘It is not denied that Mr. Hughes removed his residence to Las Vegas, Nevada, after the conference among the attorneys at Mr. Odum’s ranch in Indio, California, described in part in Mr. Slack’s letter of May 4, 1953.’

“In Mr. Hughes’ affidavit of October 13, 1953, filed in California, he stated:

“ ‘More than nine months ago I became a resident of the State of Nevada \* \* \*.’

“Nine months before October 13, 1953, is still after the filing of the California complaint.

“I mention this because the defendant would have you believe that (1) the defendant corporations who are foreign to your jurisdiction submitted themselves because Mr. Hughes lived or was about to live in Las Vegas, (2) the individual defendants, other than Mr. Hughes, and who are likewise foreign to your jurisdiction, submitted for the same

reasons, and (3) Mr. Hughes wanted to remove to Las Vegas anyway and administer the California studios from there. Please note that these defendants submitted to a jurisdiction which does not afford them the rights given in New York and California to require a substantial bond as security for costs and expenses, as witness Mr. McDonald's motion and affidavit (March 30, 1953) in the California action seeking \$35,000 'or more.'

"Mr. McDonald in his letter to you states that because of the diverse domiciles of the several defendants, 'there was no single state in which any dissident stockholder could secure jurisdiction of all the parties charged in this case.' It should be sufficient answer to ask:

"1. Since Mr. McDonald representing the corporations refused [299] to bring the action, necessitating a derivative action, and since Mr. McDonald does not represent any dissident stockholders, why is he concerned?

"2. If a single jurisdiction is required, why Nevada? Why not California where Mr. Hughes resided when that prior action was filed?

"3. Why wasn't California chosen where Mr. Hughes alone was named as the individual defendant?

"(Note: Counsel will answer that Hughes removed to Nevada, begging the whole question.)

"I do not suggest that this is all the evidence I propose to present. I believe that a full inquiry of

all the witnesses suggested will disclose collusion and in any event that Messrs. Kipnis and Mittelman are not true adversaries.

“I do not understand from the motion, which incidentally was not addressed to me, that the inquiry will be made on the 27th. Having invited the inquiry, obviously I welcome it.

“I am certain it is apparent to your Honor that neither the parties under investigation nor their counsel should conduct the investigation. It is respectfully suggested that a Special Master or Referee be appointed to take testimony in New York, California and Nevada.

“One further thing: Mr. Kipnis, as he tried before the California Court, will attempt to prejudice your Honor against me by asserting that I stated that justice could not be obtained in your Court. May I say that it wasn't more than a month or so ago that I even knew that your Honor was to try the case, and may I be presumptuous enough to say that what little inquiry I made of one or two of the lawyers here in Los Angeles was entirely favorable to your Honor. [300]

“If you examine into Mr. Kipnis' assertions in this connection, and call for his complete file, you will find that what I undoubtedly said was that under the circumstances the submission of the parties to the Nevada jurisdiction was highly suspect.

“And, without intending any reflection whatsoever on your Honor, I submit that I have made it clear that it is, and that the entire matter invites a full and complete investigation not by the accused but by the Courts.

“Respectfully yours,

“/s/ BERNARD REICH.

“cc: Honorable Ben Harrison, District Judge.

(For Filing.)

Roy W. McDonald, Esq.

Louis Kipnis, Esq.

T. A. Slack, Esq.

Woodburn, Forman & Woodburn.

A. W. Ham, Jr., Esq.

Morse & Graves.

Floyd B. Odlum, Esq.

“P.S. Please forgive my secretary signing my name to this letter as I am dictating the letter away from the office.

“BR.”

23. On October 26, 1953, I telegraphed Judge McNamee as follows:

“Kipnis Letter Twenty-fourth Irresponsible, Including Alleged Reasons for My Not Signing Letters. I Was in Cedars of Lebanon Hospital. I Reaffirm My Letters and Offer of Full Cooperation at Your Repeat Your Invitation.” [301]

24. On October 27, 1953, Judge McNamee de-

nied Mr. Hughes' motion for a hearing on my charges of October 14, 1953.

25. On October 30, 1953, I wrote Judge McNamee as follows:

“October 30, 1953.

“Honorable Frank McNamee, Judge,  
“Eighth Judicial District Court,  
“County Courthouse,  
“Las Vegas, Nevada.

“Re: Castleman v. Walker, et al.,  
Case No. 59422.

“Dear Judge McNamee:

“I received today a copy of Mr. Kipnis' letter dated October 27, 1953.

“On October 26th I telegraphed you as follows:

“ ‘Kipnis Letter Twenty-fourth Irresponsible, Including Alleged Reasons for My Not Signing Letters. I Was in Cedars of Lebanon Hospital. I Reaffirm My Letters and Offer of Full Cooperation at Your Repeat Your Invitation.’

“I do not care to extend this correspondence re Mr. Kipnis, except to state to you that his letters are false in every material particular, expressed or implied.

“I am concerned, however, with the United Press dispatch of October 27th in which you are quoted as having rejected charges that collusion between attorneys led to the dropping of the suit in Cali-

fornia and that my action in bringing the charges but refusing to appear in court was 'ill-advised.'

"I made no motion in your Court. The motion was made by Mr. Hughes' attorneys. You denied the motion as you had a right to do.

"You did not invite me to appear in your Court. I was invited [302] by the accused who are trying to pull themselves up by their boot straps by making motions as between themselves. It is similar to the situation of one golfer conceding a long putt to his own partner. Why should I come to Nevada at the invitation of Hughes' attorneys to be checked by the defendants' attorneys and cross-checked by plaintiffs' New York attorneys.

"I asked to be invited as Amicus or as an Intervener. I asked that you appoint a Special Master to take not only my evidence but the evidence of the accused and the various witnesses.

"My interest is not fees. It is only that 'right be done.' I have a duty to the Courts which I intend to fulfill. I will not, however, submit on terms dictated by the accused.

"Respectfully yours,

"/s/ BERNARD REICH.

"cc: Honorable Ben Harrison, U.S.D.C. Judge.  
(For Filing: 14848-BH.)

Louis Kipnis, Esq.

Woodburn, Forman & Woodburn, Esqs.

Floyd B. Odium, Esq."

26. As matters now stand the Nevada court has not ordered an investigation. On the other hand the New York Court in connection with the last action filed has ordered an investigation and only in connection with defendants' motion to stay the New York action. Thus, even if the Referee appointed in New York finds collusion the New York Supreme Court can only deny the motion for a stay. The Nevada action will then proceed. Hence this Court is in the best position to order an effective investigation and proceed with this cause.

27. I respectfully urge this Court to grant the within [303] motion in all respects.

/s/ BERNARD REICH.

Subscribed and sworn to before me this 13th day of November, 1953.

[Seal]     /s/ HELEN SPARKMAN,  
Notary Public in and for the County of Los Angeles, State of California. [304]

## EXHIBIT A

(Copy)

Filed: 11:53 a.m. October 17, 1953.

HELEN SCOTT REED,  
Clerk.By FRANCES PETTINGILL,  
Deputy.

Case No. 59422

Dept. No. 1

In the Eighth Judicial District Court of the State  
of Nevada in and for the County of ClarkELI B. CASTLEMAN and MARION V. CASTLE-  
MAN, Doing Business as WOLVERINE TEX-  
TILE COMPANY, and LOUIS FEUERMAN,  
Plaintiffs,

vs.

J. MILLER WALKER, FRANCIS J. O'HARA,  
JR., HOWARD R. HUGHES, NOAH DIET-  
RICH, NED E. DEPINET, HUGHES TOOL  
COMPANY, RKO PICTURES CORPORA-  
TION and RKO RADIO PICTURES, INC.,  
Defendants.

## NOTICE OF MOTION

To: Eli B. Castleman and Marion V. Castleman,  
Doing Business as Wolverine Textile Company,  
and Louis Feuerman, and Their Attorneys,  
Louis Kipnis and David Zenoff.J. Miller Walker, Francis J. O'Hara, Jr.,  
Noah Dietrich, Ned E. Depinet, and Their At-

torneys, Manly Fleischmann and Morse & Graves.

RKO Pictures Corporation and RKO Radio Pictures, Inc. and Their Attorneys, Donovan, Leisure, Newton, Lumbard and Irvine and Ham and Ham.

You and Each of You will please take notice that the undersigned will move this Honorable Court at Las Vegas, Nevada, on the 27th day of October, 1953, at 11:00 a.m. or as soon thereafter as counsel can be heard, to order a hearing with respect to certain charges made by one Bernard Reich in a written communication to the above-entitled Court, bearing date of [305] October 14, 1953, a copy of which is attached hereto and marked "Exhibit A"; by way of explanation and not to limit the generality of the inquiry hereby moved upon the Court, movant points out that apparently Bernard Reich is beyond the jurisdiction of this Court and in the communication aforesaid has not unequivocally agreed to bring himself within the jurisdiction of the Court for the purposes of investigating the charges which he proposes to make.

Movant therefore requests the Court to make the order of investigation broad and comprehensive enough that whatever measures seeming necessary may be taken to procure the oral testimony of the aforesaid Bernard Reich and to cause to be introduced in evidence at such hearing any other evidence of any kind which might be made as to the truth or falsity of the implications of the said letter of Bernard Reich, and that this Court make full

use of its powers and jurisdiction to bring about a full and complete hearing upon the matter set forth.

Dated this 17th day of October, 1953.

T. A. SLACK,  
7000 Romaine Street,  
Hollywood 38, California;

WOODBURN, FORMAN &  
WOODBURN,

By WM. K. WOODBURN,  
206 N. Virginia Street,  
Reno, Nevada;

Attorneys for Defendants Howard R. Hughes and  
Hughes Tool Company.

Affidavit of Service by Mail attached.

[Endorsed]: Filed November 16, 1953. [306]

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[Title of District Court and Cause.]

# MINUTES OF THE COURT—OCT. 19, 1953

Present: The Hon. Ben Harrison,  
District Judge.

Counsel for Plaintiffs: Harry Silver and  
Louis Kipnis;

Counsel for Applicants for Intervention:  
J. J. Brandlin;

Counsel for Defendants: Guy Knupp for  
def't RKO Radio Pictures, Inc.

Bernard Reich, Esq., respondent in Mo-  
tion (2) infra, and one of attorneys of  
record for plaintiffs.

Proceedings: For hearing motion.

(1) Of Harry Rosenthal and Gertrude Rosenthal to intervene as plaintiffs, pursuant to notice, and motion, filed Oct. 2, 1953, (copy of complaint in intervention attached to said motion);

(2) For hearing cross-motion and motion of plaintiffs for orders:

(a) Staying consideration of the motion of Harry Rosenthal and Gertrude Rosenthal to intervene, etc.

(b) Enjoining Bernard Reich, Esq., from taking any further steps in this case as alleged counsel for the plaintiffs;

(c) Substituting Henry Herzbrun, Esq., for said Bernard Reich, Esq., as local attorney of record for the plaintiffs herein;

(d) Admitting Louis Kipnis of the New York Bar, pro hac vice, and designating said Louis Kipnis, Esq., as lead counsel for the plaintiffs herein;

(e) Quashing the notice, dated Oct. 5, 1953, heretofore served by the said Bernard Reich, Esq., to take the depositions of Howard Hughes and Ross Hastings as officers and/or employees of the defendants, RKO Pictures Corp., and RKO Radio Pictures, Inc., and

(f) Granting such other and different relief as to the court may seem just in the premises, pursuant to motion, notice, order shortening time for service

of said motion, and points and authorities, filed Oct. 13, 1953;

(3) For hearing motion of def't RKO Radio Pictures, Inc., for order dismissing this action, or in the alternative, for an order staying all proceedings herein, pursuant to motion, notice, affidavit of Howard R. Hughes, affidavit of Roy W. McDonald, Memo. of points and authorities, and order shortening time for service of said motion, filed Oct. 13, 1953;

(4) For hearing motion of def't RKO Radio Pictures, Inc., for an order that depositions of Ross R. Hastings and of Howard R. Hughes, be not taken, pursuant to notice, motion, affidavit of Guy Knupp, and order shortening time for service of said motion, filed Oct. 13, 1953.

On motion of Attorney Silver, of counsel for plaintiffs, It Is Ordered that Louis Kipnis, Esq., of the New York Bar, is allowed to practice in this Court for the purposes of this case only.

Attorney Brandlin makes a statement to the Court in support of motion (1).

Attorney Reich makes a statement that he represents the plaintiffs and has no objection to granting of motion (1).

Attorney Kipnis makes a statement that he appears for the plaintiffs and that Bernard Reich is *functus officio* herein.

Attorneys Reich, Silver, and Kipnis make statements to the Court.

Attorney Brandlin makes a further statement in support of Motion (1).

The Court makes a statement. Attorney Kipnis makes a further statement in opposition to motion (1).

The Court makes a further statement and orders all further proceedings and the motions on the calendar today continued to Dec. 28, 1953, 10 a.m.

Att'ys Reich and Kipnis and the Court make further statements.

EDMUND L. SMITH,  
Clerk.

By MURRAY E. WIRE,  
Deputy Clerk. [309]

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[Title of District Court and Cause.]

# MINUTES OF THE COURT—NOV. 30, 1953

Present: The Hon. Ben Harrison,  
District Judge.

Counsel for Plaintiffs: Bernard Reich;  
Harry Silver.

Counsel for Defendants: No appearance.

## Proceedings:

For hearing motion of Bernard Reich, Esq., attorney of record for the plaintiffs, for appointment of a Special Master, pursuant to Rule 53 of FRCP,

pursuant to motion, notice, and affidavit of Bernard Reich, filed Nov. 16, 1953.

Attorney Reich makes a statement.

The Court makes a statement.

Attorney Reich makes a further statement.

It Is Ordered that cause is continued to Dec. 14, 1953, 10 a.m., for further hearing.

EDMUND L. SMITH,  
Clerk.

By MURRAY E. WIRE,  
Deputy Clerk. [347]

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[Title of District Court and Cause.]

MINUTES OF THE COURT—DEC. 14, 1953

Present: The Hon. Ben Harrison,  
District Judge.

Counsel for Plaintiffs: Bernard Reich and  
Robert Silver.

Counsel for Defendants: Guy Knupp for  
def't RKO Radio Pictures, Inc.

Proceedings:

For further hearing motion of Bernard Reich, Esq., Local Attorney of record for plaintiffs, for appointment of a Special Master, pursuant to Rule 53 of FRCP, pursuant to motion, notice, and affidavits of Bernard Reich, filed Nov. 16, 1953.

Attorney Reich makes a statement to the Court.

Court Orders that the further hearing of said motion is continued to the end of the calendar.

Later, at 10:45 a.m., all being present as before.

Attorney Reich makes a further statement and argues further in support of said motion for the appointment of a Special Master.

Each of Attorneys Silver and Knupp makes a statement.

Court Orders that said motion for appointment of a Special Master is stricken from the calendar and held in abeyance until after the trial of the Nevada action.

It Is Further Ordered that the motions heretofore continued to Dec. 28, 1953, 10 a.m., for hearing are also stricken from the calendar and held in abeyance until after the trial of the Nevada action.

EDMUND L. SMITH,  
Clerk.

By MURRAY E. WIRE,  
Deputy Clerk. [348]

[Title of District Court and Cause.]

MINUTES OF THE COURT—DEC. 29, 1953

Present: The Hon. Ben Harrison,  
District Judge.

Counsel for Plaintiffs: No appearance.

Counsel for Defendants: No appearance.

Proceedings:

It Is Ordered that this cause be, and it is placed on the calendar of Jan. 11, 1954, 10 a.m., for hearing on the settlement of order vacating the order of dismissal of June 26, 1953; and the clerk is directed to notify counsel.

Mailed notices to counsel.

EDMUND L. SMITH,  
Clerk.

By MURRAY E. WIRE,  
Deputy Clerk. [349]

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[Title of District Court and Cause.]

MINUTES OF THE COURT—JAN. 11, 1954

Present: The Hon. Ben Harrison,  
District Judge.

Counsel for Plaintiffs: Bernard Reich and  
Robert Silver.

Counsel for Defendants: Guy Knupp for  
def't RKO Radio Pictures, Inc.

Proceedings:

For hearing on the settlement of form of order vacating the order of dismissal of June 26, 1953.

The Court makes a statement.

Attorney Reich makes a statement.

Attorney Knupp makes a statement.

The Court states that order will be signed later.

EDMUND L. SMITH,  
Clerk.

By MURRAY E. WIRE,  
Deputy Clerk. [350]

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[Title of District Court and Cause.]

**PROPOSED ORDER VACATING DISMISSAL  
OF ACTION DATED JUNE 26, 1953**

By motion dated August 11, 1953, plaintiffs, by their attorney, Bernard Reich, moved to vacate the order of dismissal made and entered herein on June 26, 1953, on the grounds (1) that the order of June 26, 1953, purported to afford relief beyond that which was applied for by, and was different in kind from the demand in, the motion or motions, (2) that the said order purported to be wider in scope and afforded relief beyond that which was directed by minute order. (3) that the defendants failed to comply with the said minute order in that plaintiffs' attorneys were not served with any pro-

posed order, (4) that the defendants did not comply with Local Rule 7(a), and (5) that justice requires the vacation of the said order.

The said motion was based on the records and files of the [351] Court, the Notice of Hearing dated August 11, 1953, for the 5th day of October, 1953, Plaintiffs' Memorandum of Points and Authorities dated August 11, 1953, all duly served and filed, and Affidavit of Bernard Reich to be filed.

Thereafter the Affidavit of Bernard Reich in Support of Motion to Vacate Order of Dismissal Made June 26, 1953, and sworn to September 9, 1953, was duly served and filed.

Thereafter Raymond A. Cook, an attorney at law in the State of Texas, and theretofore permitted by this Court to appear in this action on behalf of the defendant Howard R. Hughes, filed a motion to appear as *amicus curiae*, and in support thereof filed an affidavit sworn to September 18, 1953. Said motion and affidavit was received by said Bernard Reich on September 19, 1953.

Thereafter said Bernard Reich filed document entitled "Reply Affidavit of Bernard Reich in Opposition to Motion and Affidavit of Raymond A. Cook as *Amicus Curiae*," sworn to October 2, 1953, which affidavit was duly served.

Thereafter Henry Herzbrun and Robert Silver filed a document entitled "Affidavit of Louis Kipnis and Leo B. Mittelman in Opposition to Motion to Vacate Order of Dismissal Made June 26, 1953,"

which affidavit was sworn to September 25, 1953, and in which said Henry Herzbrun and Robert Silver designated themselves as "Attorneys in Opposition of Motion to Vacate Order of Dismissal Made June 26, 1953."

Thereafter Bernard Reich filed document entitled "Reply Affidavit of Bernard Reich to Affidavit of Louis Kipnis and Leo B. Mittelman," sworn to October 1, 1953, which affidavit was duly served.

Thereafter defendant RKO Radio Pictures, Inc., filed the affidavit of Roy W. McDonald, sworn to September 25, 1953, which [352] affidavit was received in the mail by said Bernard Reich on October 1, 1953.

Thereafter said Bernard Reich filed document entitled "Reply Affidavit of Bernard Reich to Affidavit of Roy W. McDonald," sworn to October 2, 1953, which affidavit was duly served.

At the time of the filing of said reply affidavits plaintiffs, by their attorney, Bernard Reich, filed document dated October 2, 1953, entitled "Supplemental Memorandum of Points and Authorities in Support of Motion to Vacate Order of Dismissal Dated June 26, 1953."

Plaintiffs' motion to vacate the order of June 26, 1953, came on for hearing before this Court, Honorable Ben Harrison, District Judge, presiding, on the 5th day of October, 1953.

At the same time there came on for hearing

the motion of the defendant Howard R. Hughes for his attorney Raymond A. Cook to appear as amicus curiae.

At the said time; Bernard Reich appeared for the plaintiffs; Mitchell, Silberberg & Knupp and Donovan, Leisure, Newton & Irvine by Guy Knupp appeared for the defendant RKO Radio Pictures, Corp.; Raymond A. Cook appeared as proposed amicus curiae; and Henry Herzbrun's appearance was noted, although he did not appear.

The Court makes the following Findings of Fact:

(a) The order of June 26, 1953, afford relief beyond that which was applied for by, and is different in kind from the demand in, the motion of the defendant Howard R. Hughes, heard June 8, 1953.

(b) The order of June 26, 1953, purports to be wider in scope and affords relief beyond that which was directed by the minute order after hearing on said defendant Hughes' motion. [353]

(c) The defendants failed to comply with the said minute order in that plaintiffs' local attorney of record, Bernard Reich, was not served with the proposed order ultimately made June 26, 1953.

(d) Defendants did not comply with Local Rule 7(a) in that the proposed order ultimately made June 26, 1953, was not approved or disapproved by plaintiffs' local attorney of record, Bernard Reich.

(e) Justice requires the vacation of the said order of June 26, 1953.

(f) No notice of the dismissal of the action was given to the stockholders of the defendants pursuant to Rule 23 of the Federal Rules of Civil Procedure.

(g) Raymond A. Cook has heretofore appeared as attorney for the defendant Howard R. Hughes and is a partisan.

(h) Henry Herzbrun and Robert Silver are not attorneys of record for any of the parties to the action.

(i) Louis Kipnis and Leo B. Mittelman are not attorneys admitted to practice before this Court in this or any other action.

(j) None of the defendants have filed any memorandum of points and authorities or any memorandum pursuant to Local Rule 3(d) giving reasons why the motion of the plaintiffs should not be granted.

(k) The order of June 26, 1953, was made by this Court through inadvertence and was improperly presented to it.

The Court makes the following Conclusions of Law:

(a) The order of June 26, 1953, is invalid on its face and plaintiffs are entitled to have the said order vacated. [354]

(b) Raymond A. Cook is not entitled to appear in this action as *amicus curiae*.

(d) The defendants are deemed to have con-

sented to the granting of the plaintiffs' said motion to vacate the order of dismissal of June 26, 1953.

(d) Justice requires that the motion to vacate be granted.

Now, Therefore, It Is Ordered as Follows:

1. Plaintiffs' motion dated August 11, 1953, to vacate order of dismissal dated June 26, 1953, is granted, and the said order of dismissal dated June 26, 1953, is hereby vacated; except that the Court does not vacate that part of the order quashing the service on the defendant Howard R. Hughes.

2. Defendant Howard R. Hughes' motion for his attorney Raymond A. Cook to appear as amicus curiae is in all respects denied.

Dated: This . . . . day of December, 1953.

.....,

District Judge.

Receipt of copy acknowledged.

[Endorsed]: Filed October 20, 1954. [355]

In the District Court of the United States, Southern  
District of California, Central Division

No. 14848-BH

ELI B. CASTLEMAN and MARION V. CASTLE-  
MAN, Doing Business as WOLVERINE TEX-  
TILE COMPANY, and LOUIS FEUERMAN,

Plaintiffs,

vs.

HOWARD R. HUGHES, RKO PICTURES COR-  
PORATION, RKO RADIO PICTURES,  
INC., and THE CHASE NATIONAL BANK  
OF THE CITY OF NEW YORK,

Defendants.

### ORDER VACATING ORDER DISMISSING ACTION

On the 26th day of June, 1953, the above-entitled  
Court made and entered an Order in the above-  
entitled action, which said Order in part reads as  
follows:

“It is, therefore, Ordered and Decreed that  
the return of service of summons as to the  
defendant, Howard R. Hughes, be and the same  
is hereby quashed.

“It further appearing to the Court by the  
record in this action that there is another  
action pending in the State of Nevada in which  
the same plaintiffs herein are the plaintiffs,

and in which additional necessary defendants are joined, with all parties properly before the Court; that such action is being actively prosecuted before that Court; and that the relevant Nevada Rules of Civil Procedure are [357] identical with the Federal Rules of Civil Procedure governing actions of this type.

“It is, accordingly, further Ordered and Decreed that this action be, and the same is hereby dismissed without prejudice, the taxable costs of court exclusive of attorneys’ fees to be adjudged against the plaintiffs in the within action.”

Thereafter, and on August 11, 1953, a motion was made to vacate the Order insofar as it purported to dismiss the above-entitled action, and said motion, having been duly argued and the Court being fully advised in the premises, finds and determines that that portion of said Order dismissing said action was inadvertently made and entered, and that it was not the intent of the Court to enter any Order dismissing said action.

Now, Therefore, It Is Hereby Ordered that that portion of said Order made and entered herein on June 26, 1953, reading as follows:

“It further appearing to the Court by the record in this action that there is another action pending in the State of Nevada in which the same plaintiffs herein are the plaintiffs, and in which additional necessary defendants are

joined, with all parties properly before the Court; that such action is being actively prosecuted before that Court; and that the relevant Nevada Rules of Civil Procedure are identical with the Federal Rules of Civil Procedure governing actions of this type.

“It is, accordingly, further Ordered and Decreed that this action be, and the same is hereby dismissed without prejudice, the taxable costs of court exclusive of attorneys’ fees to be adjudged against the plaintiffs in the within action.” [358]

should be, and the same is hereby vacated and set aside, and that the remainder of said Order, reading as follows:

“It is, therefore, Ordered and Decreed that the return of service of summons as to the defendant, Howard R. Hughes, be and the same is hereby quashed.”

shall be and remain in effect.

Dated: Jan. 11, 1954.

/s/ BEN HARRISON,

United States District Judge.

[Endorsed]: Filed January 11, 1954.

Judgment docketed and entered January 12, 1954. [359]

[Title of District Court and Cause.]

MOTION TO VACATE IN PART ORDER  
ENTERED JANUARY 12, 1954, AND FOR  
OTHER RELIEF

Plaintiffs move to vacate so much of the order herein entered January 12, 1954, vacating the order of June 26, 1953, which does not vacate in its entirety the order of June 26, 1953, and which grants the quashing of the service of process on the defendant Howard R. Hughes.

Plaintiffs move to set aside plaintiffs' default on the said defendant's motion to quash service of process on him, heard June 8, 1953.

Plaintiffs move in the alternative for the appointment of a Special Master with maximum powers, all in accordance with Rule 53 of the Federal Rules of Civil Procedure, to investigate, receive and report all evidence, and make findings concerning the residence of the defendant Howard R. Hughes and the [361] allegations of Bernard Reich set forth in his affidavit submitted herewith, and including but not limited to the facts and circumstances concerning plaintiffs' default on defendant Hughes' motion to quash service and the purported removal of the defendant Hughes from the State of California to the State of Nevada.

The grounds of the said motions are as follows:

1. All of the grounds set forth in Rule 60, subdivision (b) of the Federal Rules of Civil Procedure, except Reason numbered 5 of the said Rule.

2. The default of the plaintiffs on the defendant Hughes' motion to quash service of process on him was obtained as part and parcel of a conspiracy and collusive agreements to deprive this Court of jurisdiction of this case and to confer jurisdiction on the state court of Nevada.

The motions will be based on the following:

1. The records and files of this Court.
2. The Notice of Hearing herein.
3. Affidavit of Bernard Reich in support of the motions.
4. Plaintiffs' Memorandum of Points and Authorities.

Dated: February 1, 1954.

/s/BERNARD REICH,

Attorney for Plaintiffs. [362]

[Title of District Court and Cause.]

AFFIDAVIT OF BERNARD REICH IN SUPPORT OF MOTION TO VACATE PART OF ORDER OF JANUARY 12, 1954, AND FOR OTHER RELIEF

State of California,  
County of Los Angeles—ss.

Bernard Reich being first duly sworn, deposes and says:

1. I am local attorney of record for the plaintiffs in the above-entitled action.

2. (a) Louis Kipnis and Leo B. Mittelman, whose address is 111 Broadway, New York 6, New York, are New York attorneys who appear with me as attorneys for the plaintiffs, although they are not licensed to practice in the State of California and have not been admitted for the purposes of this case.

(b) Donovan, Leisure, Newton & Irvine of 2 Wall Street, New York 5, New York, have appeared in this action as attorneys [378] for defendant RKO Radio Pictures, Inc.

(c) Thomas A. Slack of 7000 Romaine Street, Hollywood 38, California, and Raymond A. Cook of Texas, have appeared as attorneys for the defendant Howard R. Hughes.

(d) Mitchell, Silberberg & Knupp of Los Angeles, have appeared as attorneys for the defendant RKO Radio Pictures, Inc.

(e) Robert Silver of 118 S. Beverly Drive, Beverly Hills, California, has purported to appear as attorney for the plaintiffs, although there has been no substitution of attorneys.

3. On Saturday, December 13, 1952, I received a telephone call from New York from Messrs. Kipnis and Mittelman retaining me to file suit in behalf of the plaintiffs. On Monday, December 15, 1952, I filed this suit.

4. Mr. Kipnis had previously filed a similar suit in the Supreme Court of the State of New York and there was pending before New York Supreme

Court Justice Henry Clay Greenberg Mr. Kipnis' motion for the appointment of a receiver.

5. On December 26, 1952, I read in the trade papers and learned for the first time that plaintiffs had filed a derivative action in the state court in Las Vegas, Nevada. I was not informed by Messrs. Kipnis and Mittelman of their intentions to file such suit.

6. (a) On January 27, 1953, a local trade paper reported that the motion in New York for the appointment of a receiver had been withdrawn. Attached to my affidavit of September 9, 1953, and marked Exhibit "A" is a true copy of the said article purporting to recite the proceedings before Mr. Justice Greenberg.

(b) The motion for the appointment of a receiver was withdrawn in New York not only without my consent but without [379] my knowledge or prior consultation.

7. I have caused the Nevada complaint to be compared with the original complaint filed herein, and except for jurisdictional allegations the two complaints are identical. However, the amended complaint in this action introduced many additional issues. Just recently the Nevada complaint was amended and it is now similar to the complaint here which I amended.

8. (a) On or about February 4, 1953, I received a notice from the Court that the action had been placed on the calendar pursuant to Rule 16 for Monday, February 9, 1953.

(b) On February 5, 1953, I wrote to Judge Harrison asking his indulgence until I had an opportunity to confer with New York counsel personally in New York City. I received notice from the clerk that the hearing scheduled for February 9th had been continued to March 2, 1953.

9. I was in New York from on or about February 11th, 1953, to February 18, 1953. I conferred with New York counsel in my room at the Hotel Warwick. What took place at this conference I told this Court on December 14, 1953. I hereby reaffirm my statements to the Court on that date under oath now.

10. At that conference in New York City, New York counsel agreed that I should amend the complaint. I so informed Judge Harrison on March 2, 1953.

11. (a) The amended complaint herein was filed on March 4, 1953, and service was thereafter made on the defendant Howard R. Hughes at the Beverly Hills Hotel and on RKO Radio Pictures, Inc., at its Los Angeles studio. The defendant RKO Pictures Corporation refused to submit to process on the ground that it was not doing business in California. [380]

(b) The defendant RKO Radio Pictures, Inc., was served not only with process but with a Notice of the Taking of the Deposition of its officer and employee, the defendant Howard R. Hughes.

12. With respect to the Nevada action, I learned that Mr. Hughes had submitted himself to the juris-

diction in Nevada as did the defendant RKO Pictures Corporation, notwithstanding it did no more business in the State of Nevada than it did in the State of California. I learned for another thing that Nevada has no security law such as may be available to defendants in the State of California. From the U. S. Marshal I learned that Mr. Hughes had purported to renounce his Beverly Hills residence for Las Vegas, Nevada, apparently between the time this action was filed and the complaint was amended and served at the Beverly Hills Hotel, and shortly before he accepted service of process in the Nevada action.

13. Messrs. Kipnis and Mittelman, by letter and by telephone, importuned me and instructed me to withdraw the Notice of Mr. Hughes' deposition. I told them that the deposition was necessary on the issue of any application for security. They both assured me that no such motion would be made and if made they would consider it an act of bad faith and that I would then be free to notice Mr. Hughes' deposition. I complied with their request; but soon thereafter was served with two sets of motion papers, one in behalf of the defendant Howard R. Hughes to quash the service on him on the ground that he was not at the time of purported service a resident of Beverly Hills, California, but had removed to Las Vegas, Nevada. The second was a motion in behalf of the defendant RKO Radio Pictures, Inc., for security pursuant to the Corporations Law of the State of California. Mr. Hughes' motion to quash did not [381] give the date when

he removed to Las Vegas, Nevada, and my affidavits to the effect that Mr. Hughes did not purport to renounce his Beverly Hills residence until after this action was filed have not been denied.

14. Both motions were made returnable April 13, 1953; I noticed Mr. Hughes' deposition for April 9, 1953.

15. Again Messrs. Kipnis and Mittelman importuned me to withdraw the notice of Mr. Hughes' deposition. Not wanting to be a part of any plan to deprive this Court of jurisdiction and to convey that jurisdiction to Nevada, I refused; but it was agreed not only by New York counsel but by defendants' counsel here that Mr. Hughes' motion to quash process would go over to April 27, 1953, and RKO's motion for security would go over to June 8, 1953.

16. On April 20, 1953, I wrote to Mr. Mittelman as follows:

"Air Mail.

"Special Delivery.

"Leo B. Mittelman, Esq.,

"111 Broadway,

"New York 6, New York.

"Re: Castleman v. Hughes.

"Dear Leo:

"There is nothing in my letter of April 13th which could have properly provoked your tirade of

April 16, 1953, unless you were prompted by some deep-rooted feelings of your own which have little or nothing to do with me.

“I would suggest that you don’t write to me in this fashion again.

“I would suggest further that you make an application to substitute me out of the case.

“In any event I am giving consideration to laying the entire [382] matter, including our exchange of correspondence, before Judge Harrison.

“A fair review of what has happened is as follows:

“1. You retained me to file suit in California on the basis of a minimum of 10% of the fees received by us in all actions. Additional fees to me were to be fixed by Bernie Fischman.

“2. Without consulting me or apprising me of the facts, Kipnis met with Hughes and Floyd Odum at the Cochran Ranch.

“3. You filed in Nevada and Texas without discussing same with me and without my knowledge.

“4. You dropped receivership proceedings in New York without consulting me and without my knowledge.

“5. You and Kipnis met with me in my hotel room and advised me that the defendants had agreed to submit to the jurisdiction in Nevada, where there was no law regarding security. You

advised me that you had a satisfactory understanding with the defendants and that you hoped to settle the matter in Nevada after some adversary proceedings. You agreed with me that for safety's sake the action in California should stand by.

"6. Since Judge Harrison had already had me up pursuant to Rule 16, you authorized me to tell Judge Harrison that I would file an amended complaint and serve, which is what Judge Harrison insisted on.

"7. Between the time of the original filing and the amended complaint filing, Hughes left the Beverly Hills Hotel for Las Vegas.

"8. The parent company refused to submit to the jurisdiction here, although it submitted in Nevada.

"9. Another plaintiff has now filed in the federal and state courts. [383]

"10. When Guy Knupp and I appeared before Judge Harrison to put over Slack's motion to vacate process on Hughes to June 8th, the same date as the motion for security, Judge Harrison stated that he was looking for some way to dismiss the action inasmuch as a similar action was filed by the same plaintiffs in Nevada. I told Judge Harrison that I wanted the California action to be a standby action and asked him that if we could keep the action quiescent and not trouble him with motions whether he would not keep the action. He didn't directly

answer me, but I felt confident that if this could be done Judge Harrison would cooperate.

“11. Referring directly to your letter of April 16th:

“(a) With respect to the second paragraph thereof: Defendants’ motions were not precipitated by my unilateral decision to attempt to serve the defendants. Judge Harrison insisted on service. All our prior correspondence did not refer merely to filing an amended complaint and not to serving same. I informed you that I was going to serve. I informed you further that Judge Harrison insisted that I serve.

“(b) With respect to the third paragraph thereof: I don’t give a damn that the motions were evoked by my attempted service, and I don’t care whether you control or don’t control the defendants or their counsel.

“(c) With respect to the fourth paragraph thereof: Kipnis and Slack have agreed that the motion to quash Hughes’ service shall go over to June 8th. The court has agreed that the matter shall go over to June 8th and I will appear on April 27th to effectuate the continuance. [384]

“(d) With respect to the seventh paragraph thereof, page 3: I answered your letter of January 23rd fully by indicating the amendments to the complaint which you approved, and which were subsequently put in as the amended complaint.

What's that go to do with my letter of April 8th concerning a deposition of Howard Hughes?

“(e) With respect to paragraph fifteen thereof: I can endure any reasonable restraint, but I will not be abused by you or deterred from what I think is my duty in this case. I don't understand, furthermore, what you mean that your obligation to me will survive the California action.

“(f) With respect to paragraph nineteen, fourth paragraph from the bottom of page 3: On what do you base your belief that it would not be possible to attach Hughes' personal property in California?

“(g) With respect to the last paragraph thereof: You say that you do not wish me to offer any resistance to Hughes' motion. However, how about the motion for security? Have you forgotten that you once told me that the motion for security, if made, would be in bad faith? I want to know now and at the same time what your instructions are regarding both motions.

“Now get this, and get it straight:

“I have been pushed as far as I will go. When I filed this complaint I put my honor and reputation behind it. I told you in that hotel room that I consider that I represent 76% of the stock and not just your clients. I told you that I would not stand for any deal with Hughes or with the defendants which was not fair to the stockholders. Incidentally, I didn't learn until [385] very recently

that your action in Nevada was not in the federal court but in the state court. Why?

“The more I think of it, the more I see no way out than to take the entire matter up with Judge Harrison and obtain his instructions.

“Very truly yours,

“/s/ BERNARD REICH.

“cc. Bernard D. Fischman, Esq.”

17. On April 22, 1953, Mr. Kipnis wrote me as follows:

“Bernard Reich, Esq.,  
“9441 Wilshire Boulevard,  
“Beverly Hills, California.

“Dear Bernie:

“Your special delivery letter of the 20th arrived today.

“We are amazed to learn that despite asking for our ‘orders’ you do not see fit to follow the instructions of those who hired you.

“The statements contained in your letter are largely not statements of fact and are not in accord with the record. Further, your allusions to matters extraneous to the issue before Judge Harrison are groundless and I do not propose to argue them with you again. Moreover, they are beside the issue as to whether to contest the Hughes’ motion to quash the attempted service upon him.

“I am sending a copy of this letter to Judge

Harrison and all adversary counsel since you seem to be considering it.

“The chronology of litigation, in our pursuit of the defendants is that the New York case was filed first; the California case, second, and the Nevada case third. In [386] Nevada (whose Rules of Procedure have been patterned on the Federal Rules) we have irrevocable jurisdiction over all necessary and proper parties. In Nevada, we are confident we will have a full, proper, thorough and just trial of the action.

“In point of fact we are now examining hundreds of documents in preparation for depositions to commence tomorrow and to continue from day to day. Scheduled for examination are the corporation, its President, Vice-President and General Counsel and three directors and former directors living here in the East.

“We are convinced that the attempted service on Hughes is not good and that his motion to quash is well taken. We previously told you about our information relative to his non-residence.

“In view of the foregoing, even if it were possible to obtain service upon Hughes, we would not wish to accomplish it because it is not possible to obtain jurisdiction over all other proper and necessary parties, as we have in Nevada.

“It is, therefore, our recommendation that you devote no further time or expense to attempt to establish the contrary to what we now know to be

the fact, namely, Hughes' residence in Nevada.

"We consider that your duty as local counsel to us is to comply with our request with respect to the motion coming on to be heard on April 27, 1953.

"Sincerely,

"/s/ LOU.

"LK:ms.

"Copies to:

"Hon. Ben Harrison, United States District Court, Los Angeles California. [387]

"Tom A. Slack, Esq., Mitchell, Silberberg & Knupp, Esqs., 6399 Wilshire Boulevard, Los Angeles 48, California."

18. Prior to the return date of Mr. Hughes' motion to quash on April 27, 1953, however, I met with one of the attorneys for Mr. Hughes who agreed that the motion should go over to June 8th. This was approved by Judge Harrison on April 27th, although the Court referred to Mr. Kipnis' letter instructing me to default. My duty to my clients prevented me from laying the entire matter before the Court. I merely stated to Judge Harrison that there was a difference between New York counsel and myself and that I hoped to have it resolved before June 8th.

19. In the meantime, at the instance of Messrs. Kipnis and Mittelman, on May 22, 1953, I entered into a stipulation with Mr. Guy Knupp of Mitchell, Silberberg & Knupp, and Mr. Roy W. McDonald of Donovan, Leisure, Newton & Irvine, attorneys for

defendant RKO Radio Pictures, Inc., which continued the motion for security to August 10, 1953, and continued Mr. Hughes' deposition to July 27, 1953. It was also arranged that the plaintiffs would default on the motion to quash service of process on Mr. Hughes.

20. Pursuant to the understanding I did not appear on the return date of the motion to quash the service of process on Mr. Hughes.

21. On or about July 13, 1953, I conferred with Mr. Kipnis in my office and had dinner with him and my wife at the Miramar Hotel in Santa Monica. Our entire discussion was based on the fact that the California action would proceed as [388] a standby action.

22. This conversation took place with Mr. Kipnis notwithstanding on June 26, 1953, with the consent of Mr. Kipnis but not with my consent or knowledge this action was dismissed. I had known nothing about the matter since the default on June 8, 1953; but on July 14, 1953, the day after speaking to Mr. Kipnis, I received a telephone call from an attorney in the office of Mitchell, Silberberg & Knupp who asked me if the order of June 26th had not dismissed the action against all of the defendants. He thereupon read me the order about which I learned for the first time.

23. By motion dated August 11, 1953, plaintiffs, by your deponent as their attorney, moved to vacate the Order of Dismissal made and entered June 26, 1953, on the grounds (1) that the order of June 26,

1953, purported to afford relief beyond that which was applied for by, and was different in kind from the demand in, the motion or motions; (2) that the said order purported to be wider in scope and afforded relief beyond that which was directed by minute order; (3) that the defendants failed to comply with the said minute order in that plaintiffs' attorneys were not served with any proposed order; (4) that the defendants did not comply with Local Rule 7(a), and (5) that justice requires the vacation of the said order.

24. Said motion was based on the records and files of the Court, the Notice of Hearing dated August 11, 1953, for the 5th day of October, 1953; Plaintiffs' Memorandum of Points and Authorities dated August 11, 1953, all duly served and filed, and my Affidavit which was to be filed. Thereafter I filed my affidavit which was sworn to September 9, 1953, and it was duly served. [389]

25. Thereafter Raymond A. Cook, an attorney at law in the State of Texas, and theretofore permitted by this Court to appear in this action on behalf of the defendant Hughes, filed a motion to appear as amicus curiae, and in support thereof filed an affidavit sworn to September 18, 1953. Thereafter I filed a reply affidavit sworn to October 2, 1953, which was duly served.

26. Thereafter Henry Herzbrun and Robert Silver filed a document entitled "Affidavit of Louis Kipnis and Leo B. Mittelman in Opposition to Motion to Vacate Order of Dismissal Made June

26, 1953," which affidavit was sworn to September 25, 1953, and in which said Henry Herzbrun and Robert Silver designated themselves as "Attorneys in Opposition of Motion to Vacate Order of Dismissal Made June 26, 1953." I filed and served a reply affidavit sworn to October 1, 1953.

27. Thereafter Roy W. McDonald filed his affidavit sworn to September 25, 1953, to which I replied by an affidavit sworn to October 2, 1953.

28. On October 5, 1953, the return date of my motion, I appeared for the plaintiffs; Mitchell, Silberberg & Knupp, and Donovan, Leisure, Newton & Irvine appeared for the defendant RKO Radio Pictures Corp.; Raymond A. Cook appeared as proposed amicus curiae; and Henry Herzbrun's appearance was noted, although he did not appear.

29. None of the defendants filed any memorandum of points and authorities or any memorandum pursuant to Local Rule 3(d) giving reasons why the motion of the plaintiffs should not be granted.

30. Mr. Cook's motion to appear as amicus curiae was denied so that no one appeared for the defendant Hughes. [390]

31. The Court in ruling that the order of dismissal should be vacated stated that it would not set aside the quashing of the service of Mr. Hughes, although my motion was to set aside the entire order and to which there was no opposition from the defendant Hughes.

32. I was induced to permit Mr. Hughes' motion

on June 8, 1953, to be granted by default by extrinsic fraud, part of a plot and conspiracy to deprive this Court of jurisdiction of the action and to confer unlawfully and by fraud jurisdiction on the Nevada court.

33. The default on June 8, 1953, came about as follows:

On May 5, 1953, I wrote Messrs. Kipnis and Mittelman as follows:

“Louis Kipnis and Leo B. Mittelman, Esqs.,  
“111 Broadway,  
“New York 6, New York.

“Re: Castleman v. Hughes,  
D.C. Cal. No. 14848-BH.

“Dear Lou and Leo:

“I assume that you have seen this month’s Fortune magazine on Howard Hughes.

“When Leo telephoned me April 26th to advise me that Slack had consented to continuing his motion to June 8th so that Leo could talk to me on the subject again, I expected that I would hear from you before this as to what is to be done on June 8th.

“I know that you do not wish me to oppose Slack’s motion to vacate the service on Hughes. I still do not know what your wishes are concerning the motion for security.

“As I told Slack’s partner, Cook, I do not want to be devoured piecemeal. I told him that if he would not press [391] for security I would give consideration to consenting to the motion re Hughes.

Neither he nor you have given me any answer at all on this question of security.

“I therefore intend, if I am still in the case, to oppose the motion for security on June 8th. To do this successfully I must have the deposition of Howard Hughes. I intend therefore to notice the deposition of Howard Hughes for some reasonable time prior to June 8th.

“Naturally in this deposition I will inquire into his residence.

“I would not want to delay serving notice of Hughes’ deposition beyond Monday, May 11th.

“I would appreciate very much having your views and instructions by the last-mentioned date.

“I think also that we should get our own house in order and I would appreciate very much your answering my letter of April 27, 1953.

“Sincerely yours,

“/s/ BERNARD REICH.”

On May 7, 1953, Mr. Mittelman wrote me as follows:

“Bernard Reich, Esq.,  
“9441 Wilshire Boulevard,  
“Beverly Hills, California.

“Dear Bernie:

“This will be in answer to your letter of May 5, 1953, and certain previous communications. Indeed, after discussing the entire matter with our mutual friend, I prepared this letter limiting it to the pur-

pose of acceding to your desire, frequently expressed, to be substituted out of the case. However, I delayed a few days because I thought it advisable to [392] review the situation to satisfy you and, indeed, myself as well, that this outcome was inevitable. It is regrettable that we have not been able to hit it off, but frankly I cannot see that we at this end are to blame for the pass to which we have come.

“Our interest as attorneys in the RKO situation goes back to a period late in 1949 when we were first consulted by a client who was dissatisfied at the way in which Hughes was acting relative to RKO. As a matter of fact, on behalf of the client we were in communication with Lloyd Wright and Dietrich on the warrant matter and we had drafted a complaint in 1950 which was not served because our client decided not to press the matter. We did nothing affirmative again until we were consulted by clients in 1952, who were sufficiently outraged to order us to sue. After the suit was commenced, we heard from certain other members of the bar that they too had been thinking of suing Hughes. In any event, we started suit in New York on the day after the sale of the Hughes' stock in September. Unfortunately, however, we could not serve Hughes in this jurisdiction.

“We next resorted, in all good faith, to the receivership application. And yet, with all the publicity attendant upon this, no other suits were started anywhere by anyone before April of 1953.

“For your information, no RKO shareholder came forward in support of the receivership application. As a matter of fact, the only person who did show up was I. J. Kresel, Esq., one of the most eminent New York lawyers who on behalf of the largest single shareholder of RKO, opposed the receivership. In the face of this opposition and the applications for adjournment supported by Disney and Goldwyn counsel, Lou’s was a lone voice crying in the wilderness. [393]

“In this posture Lou wrote to Charles Allen, Louis B. Mayer and Floyd Odlum with a view to get them to step in and lend a measure of confidence to the Company. Allen, an aggressive Wall Street underwriter, sent back word that he would not touch RKO with a ten-foot pole. Mayer did not even respond. Odlum, disclaiming any interest in getting back in the company, was nevertheless sufficiently interested through the Atlas holdings in RKO to listen to Lou in his efforts at avoiding more unfavorable publicity and damage to the Corporation during the pendency of the suit.

“All of this took place before we wrote you in December to ask you to act as our local counsel for a ‘standby’ action. Thereafter and around Christmas time you wrote ‘Don’t worry about me, this is your show.’ We assumed that you meant it and that you meant it when you said further ‘I did not call you because I did not trust your good faith \* \* \*.’ Yet from that day forward, we have had a continuing flow of letters which not only impliedly

impugned our good faith but which are expressly accusatory. Finally on April 20 you suggested that we 'substitute (you) out of the case,' and on April 27 you wrote that you would 'like everything settled between us within the next ten days.'

"Your attitude, it seems, stems from an idea which you have and which we have been unsuccessful in changing that there is something indeed 'suspect' about the action commenced by us in Nevada because of the willingness of the defendants to appear there and not to appear either in New York or California.

"And yet there should be and there is no mystery about this. Our pursuit of Hughes was relentless. Lou's letters, looking for an RKO savior, brought a meeting with Odlum. At Odlum's invitation Lou met with Tom Slack, Hughes' attorney, at [394] Mr. Odlum's ranch in Indio, California. Odlum did not doubt for one moment, nor indeed did Mr. Slack that there had to be an ultimate determination of the issues raised by our action. Odlum's position as peacemaker was that he would like to see as speedy a determination of the issues as possible.

"Slack took the view throughout that Hughes would not submit to jurisdiction in California come what may, but that he, Hughes, would not avoid service in Nevada, his intended and actual residence, and would appear there.

"It must be clearly understood that other than this agreement for Hughes' appearance in Nevada,

no other agreement of any kind was made. That is not to say that the parties did not see the possibility of a settlement of litigation since all lawyers, if they are sensible, appreciate that at some point in a litigation such a result is possible and advisable. It is my understanding that Mr. Slack, following his conversation with Lou and Mr. Odlum, and after Lou had gone to Las Vegas to study the situation there and to commence action (if satisfied that that would be beneficial) got in touch with counsel for RKO and explained to them the entire situation, in consequence of which the corporation also, in the interests of a speedy determination of the issues, appeared in the Nevada action.

“So much for the background of Lou’s arrangements with respect to appearances and expedition.

“You intimate that Lou had no business meeting with Mr. Odlum and Mr. Slack without ‘apprising (you) of the facts’ and yet you admit that I advised you several months ago on the telephone of the fact of Lou’s presence at Odlum’s ranch.

“You ask for specificity relative to Lou’s statement of lack of accuracy in your various recitals of ‘fact.’ The previous [395] paragraph is a good jumping-off point; here are some others.

“(1) Neither Lou nor I ever met Hughes anywhere, any place, any time.

“(a) No action was ever started by us in Texas or any other place except as above.

“(3) We never told you we had a deal, any-

wheres, any time, any place and never said anything in the New York hotel room which adds up to your ‘#5’ of your letter of April 20. We went no further than to say that we hoped that after a full and complete examination, we might reach a settlement—the ambition of any lawyer.

“(4) As to ‘#8’ of this same letter, Sec. 1695 of Title 28, U.S.C., was always available to us, anywhere, any time and any place.

“We have never done or said anything to merit your violent expressions against us and because of their utter groundlessness, as this and our prior letters have established, we must accede to your request that you be relieved as local counsel in California.

“If the form, which you sent us when you wanted to be substituted as co-counsel with Lou in place of Lou alone, in the New York case, is satisfactory, we will prepare it and insert the name of substituted counsel and forward it to you for use in California.

“In view of the foregoing, we want you to do nothing further in this case and we want you to consider yourself relieved of any position in this case. Whatever authority we have heretofore granted to you is hereby revoked and cancelled.

“Sincerely yours,

“/s/ LEO.

“LBM:ms. [396]

“P.S. Since you have not given us any facts in your exclusive possession, we feel that no possible

prejudice can accrue to you on that score.

“LBM.”

On May 11, 1953, I wrote Mr. Mittelman as follows:

“Leo B. Mittelman, Esq.,

“111 Broadway,

“New York 6, New York.

“Re: Castleman v. Hughes,  
No. 14848-BH.

“Dear Leo:

“I have your letter of May 7, 1953.

“In my letter of May 5th, to which you allege yours is a response, I wrote:

“ ‘As I told Slack’s partner, Cook, I do not want to be devoured piecemeal. I told him that if he would not press for security I would give consideration to consenting to the motion re Hughes. Neither he nor you have given me any answer at all on this question of security.

“ ‘I therefore intend, if I am still in the case, to oppose the motion for security on June 8th. To do this successfully I must have the deposition of Howard Hughes for some reasonable time prior to June 8th.’

“In my letter of April 27th I wrote:

“ ‘My question to you still is what is to happen to both motions on June 8th? Also, whether I am free to oppose the motion for security on June 8th with all the proper means available to me?’ [397]

“How your letter of May 7th constitutes an answer to my letters is beyond me.

“Is it that you do not wish to oppose either motion?

“I gather from your letters, every one of them, that you do not recall everything you said to me in December when Lou was in California, or what was said to me in my New York hotel room in the presence of Bernie.

“In any event whether it be before Judge Greenberg, Chief Judge Yankwich or Judge Harrison, in New York, in California or in Nevada, in this action or any other action or proceeding, I intend to fulfill my sworn duty to the courts and to the RKO stockholders.

“To go back to just one thing: Soon after the Cochran Ranch conference, Lou was intimating that the receivership would not be pressed. Then, on January 26, 1953, Lou apparently told Judge Greenberg that since the RKO board had been reconstituted (that is, resumption of Hughes' control), Lou was withdrawing the receivership application.

“Like the matter of the Cochran Ranch, you did not tell me of the withdrawal of the application until after it was done.

“I told you then that this was wrong and made no sense.

“Now *Fortune* (page 123) states:

“‘The ironic aspect of this whole affair is that

the syndicate by its very eagerness to make a fast buck, might have been a distinct improvement over the sort of management RKO has had in the past five years.'

"As to substitution, you say nothing in your letter of my fees or the costs which I have expended. The form of substitution which I sent you in more peaceful days, and which involved a different situation entirely is of course not applicable [398] here.

"Please therefore advise the terms of substitution which you wish me to consider.

"In the meantime, and so that there will be no prejudice to the clients, I am noticing Hughes' deposition which will be absolutely necessary if you wish to oppose the motion for security on June 8th.

"I am noticing the deposition for May 28, 1953. This will give you sufficient time to effectuate a substitution and withdraw the notice if you still wish to do so. In this way the clients will be protected, in case they want to oppose the motions on June 8th, and will not be prejudiced by me if you do not want to oppose them.

"Incidentally I assume by your postscript that you acknowledged my right to file for other stockholders—although you misunderstood my reference to other facts.

"Sincerely yours,

"/s/ BERNARD REICH."

On May 13, 1953, Mr. Kipnis wrote me as follows:

“Bernard Reich, Esq.,  
“9441 Wilshire Boulevard,  
“Beverly Hills, California.

“Dear Bernie:

“Leo has been in Montreal since yesterday and won't be here before Friday.

“In his May 7th letter, he stated that we ‘want you to do nothing further in this case and we want you to consider yourself relieved of any position in this case. Whatever authority we have heretofore granted to you is hereby revoked and [399] cancelled.’

“This seemed to be a clear answer to your inquiries as to what you are to do, that is, to do nothing to oppose either motion. We told you so most explicitly by letter of April 16, 1953. The letter also told you that a substitution was forthcoming—which it is.

“I don't want to be in the position of answering a letter addressed to Leo, so please consider this merely as a stop-gap reply conveying the news of a substitution having been dispatched out.

“Sincerely yours,

“/s/ LOU.

“LK:ms.”

On May 15, 1953, I wrote Mr. Kipnis as follows:

“Louis Kipnis, Esq.,

“111 Broadway,

“New York 6, N. Y.

“Re: Castleman v. Hughes.

“Dear Lou:

“I have your letter of May 13, 1953.

“You say in substance that by letter of April 16, 1953, you told me to do nothing to oppose either motion.

“I have reread that letter very carefully and find only that Leo told me to offer ‘no resistance whatever to the motion being made by Hughes’ counsel to quash service.’

“All of my previous correspondence referred to both motions.

“After receipt of your letter of April 16th, and on April 20, 1953, I wrote Leo in part as follows (page 3):

“‘You say that you do not wish me to offer any resistance to Hughes’ motion. However, how about the [400] motion for security? Have you forgotten that you once told me that the motion for security if made, would be in bad faith? I want to know now and at the same time what your instructions are regarding both motions.’

“Your letter of April 22, 1953, again only referred to the motion to quash.

“On April 27, 1953, I wrote you as follows:

“‘My question to you still is what is to happen to both motions on June 8th? Also, whether I am

free to oppose the motion for security on June 8th with all the proper means available to me?’

“On May 5, 1953, I wrote to both of you in part as follows:

“‘I therefore intend, if I am still in the case, to oppose the motion for security on June 8th.’

“‘There is nothing in Leo’s letter of May 7th which says directly that the motion for security should not be opposed. True, you attempt to fire me and instruct me to do nothing in the case. Does that mean that the motion for security will not be opposed on June 8th? Who are you kidding? You’re trying to fire me so that the motion for security on June 8th will not be opposed.

“‘I don’t know why you are so squeamish about answering a letter addressed to Leo. You and Leo have been interchanging answers right along. I take it, however, that on the question of the terms of substitution, that is with respect to my fee and costs, you are leaving that to Leo just because my letter of May 11th was addressed solely to Leo.

“‘One good piece of advice without charge: [401]

“‘If the motion for security returnable on June 8, 1953, is not opposed, and there is no question in my mind that not only should it be opposed but that it can be successfully opposed, you and Leo leave yourselves open to a charge of malpractice to say the very least.

“Sincerely yours,

“BERNARD REICH.”

On May 18, 1953, Mr. Mittelman wrote me as follows:

“Bernard Reich, Esq.,  
“9441 Wilshire Boulevard,  
“Beverly Hills, California.

“Dear Bernie:

“In answer to your letter of May 15, 1953.

“Re: Terms of Substitution.

“Our agreement was that in consideration of your acting as our local counsel in the California action, you would receive not less than 10% of all the fees we might be awarded in our several actions. In the event of services performed by you in excess of those anticipated, it was agreed that Bernie Fischman would determine whether and to what extent you were to receive any additional sum.

“In our letter of April 16, 1953, we stated ‘Our obligation will survive the California action.’ By that we meant that regardless of the disposition of the California action, we intended to and would honor our agreement with you. In short, please accept this letter as meaning that by stepping out of the action your rights with respect to our arrangements regarding fees and costs will not be prejudiced.

“Re: Motion for Security.

“It was not our intention to let the ‘security’ motion [402] go by default. When we wrote asking you to do nothing, it meant just that—we did not

want you to do anything affirmative but that we would.

“As Step One, we are stipulating to a simultaneous adjournment of the security motion plus the notice of taking of deposition of Hughes, all subject to Court approval and without prejudice.

“Therefore, if the stipulation adjourning the ‘security’ motion and the deposition come in before you are formally substituted, won’t you please sign it. If it comes in after you are substituted, then, of course, we will have Herzbrun sign it, and we have so written him.

“Sincerely yours,

“LEO.

“LBM:ms.”

On May 19, 1953, I wrote Mr. Mittelman as follows:

“Leo B. Mittelman, Esq.,

“111 Broadway,

“New York 6, New York.

“Re: Castleman v. Hughes,

D.C. Cal. 14848-BH.

“Dear Leo:

“I have your letter of May 18th and I have talked to Henry Herzbrun again today.

“Regarding the terms of substitution, I accept your understanding with respect to the 10%, and I waive any further fees so that Bernie Fischman need not make any determination.

“On the other hand, I wish to have my costs paid

now. Not including the unposted disbursements which may go back [403] a month or two (because of my setup here) they amount to \$143.69.

“I consider myself to be wrongfully discharged and entitled to insist on a fixed fee and payment of my costs at this time. However, because of Bernie Fischman I would waive that right providing my costs are paid.

“I would also like a commitment from you that you will press in Nevada the charges I made here in California. Incidentally, should you want my evidence and my help in this connection I gladly offer it to you, in which case we can leave it to Bernie to decide any additional compensation.

“I suggest further that you prepare a letter agreement which I can file with the defendants in New York, Nevada and California.

“Regarding the motion for security, I will of course sign the stipulation adjourning the security motion and the deposition if the substitution does not come in in the meantime. This is precisely what I have been pleading for these many weeks. Had you clarified this matter along these same lines some time ago there would have been no need of the substitution.

“Just what was it that changed the minds of the defendants?

“In any event I wish you good luck and success in Nevada.

“Sincerely yours,

“/s/ BERNARD REICH.”

34. The stipulation referred to in the last two letters reproduced above came in on May 22, 1953. I signed it. As already indicated it provided that the defendant RKO's motion for security be continued to August 10, 1953, and that Mr. Hughes would give his deposition in my office, subject [404] to applications, on July 27, 1953.

35. I had no reply from Mr. Mittelman to my letter of May 19, 1953, when I wrote him on June 26, 1953, as follows:

“Leo B. Mittelman and Louis Kipnis, Esqs.,  
“111 Broadway,  
“New York 6, New York.

“Re: Castleman v. Hughes,  
D.C. Cal. 14848-BH.

“Gentlemen:

“I still do not have a reply to my letter of May 19, 1953.

“Today I learned for the first time that at the instance of Mr. Herzbrun subpoenas were issued calling for the depositions of Dore Schary, N. Peter Rathvon, Jerry Wald, Norman Krasna, Sid Rogell, Sam Bischoff, Jack Skirball and Frank Ross in connection with the Nevada action.

“I consider these steps as in breach of our relationship and moreover not in the best interests of the clients.

“I could have approached these men and would have made them friendly witnesses instead of the hostile witnesses they now will be.

“I think you will find that before you actually take these depositions you will go through all the work and trouble which you wish to avoid in connection with Hughes, and about which you lectured me.

“Not having heard from you in response to my letter of May 19, and in view of the present circumstances, I withdraw my waiver of any further fees mentioned in my said letter.

“Please prepare and forward to me an agreement of substitution.

“If I do not hear from you within the week, I shall feel free to act in any way necessary to protect my interests. [405]

“Very truly yours,

“/s/ BERNARD REICH.

“cc: Bernard D. Fischman, Esq.,  
Henry Herzbrun, Esq.

“P.S. My total disbursements up to date are \$262.05.

“BR.”

On the very day I wrote the letter this Court, at the instance of plaintiffs' New York counsel and the defendants' counsel, and without my knowledge or consent, signed the order of dismissal presented to it by the said attorneys.

On December 14, 1953, Judge Harrison stated of this order:

“The Court: I am referring to the order which was dismissed, I think, incorrectly and which was unfairly presented to the Court.” [Page 34, lines 2-4.]

36. It is clear that plaintiffs' New York lawyers and defendants' were overanxious in depriving this Court of its jurisdiction. As the exchange of letters indicate I was willing to let Mr. Hughes' motion to quash go by default on condition that the motion for security be opposed and that the California action which was filed prior to the Nevada action would at least remain as a standby action. I was assured of this by the direct representations of plaintiffs' New York counsel and by the stipulation entered into by defendants' counsel in connection with the motion for security and the deposition of Mr. Hughes.

37. I would not have defaulted on June 8th on Mr. Hughes' motion to quash service on him had I not relied on the aforesaid representations and stipulation. Moreover I am convinced that [406] Mr. Hughes is a resident of California. I have been informed by an investigator that Mr. Hughes still maintains a residence in Beverly Hills and in recent months has spent a great deal of his time here.

38. In their Amended and Supplemental Complaint filed in Las Vegas, Nevada, on December 22, 1953, plaintiffs allege, Paragraph II, subdivision (e) “Defendant Howard R. Hughes is the principal stockholder of Hughes Tool and purports to be

domiciled in Texas but resides in Texas, Nevada or California.”

39. In his answer filed in Las Vegas, Nevada, on December 31, 1953, Mr. Hughes states: “Answering the allegations contained in Paragraph II (e), this defendant admits the same.”

40. I respectfully incorporate by reference all my affidavits heretofore made and on file, including:

(a) Affidavit of Bernard Reich in Support of Motion to Vacate Order of Dismissal, sworn to September 9, 1953.

(b) Reply Affidavit of Bernard Reich in Opposition to Motion and Affidavit of Raymond A. Cook as Amicus Curiae, sworn to October 2, 1953.

(c) Reply Affidavit of Bernard Reich to Affidavit of Louis Kipnis and Leo B. Mittelman, sworn to October 1, 1953.

(d) Reply Affidavit of Bernard Reich to Affidavit of Roy W. McDonald, sworn to October 2, 1953.

(e) Affidavit of Bernard Reich in Support of Motion for the Appointment of a Special Master, sworn to November 13, 1953.

(f) Affidavit of Bernard Reich in Reply to Affidavit of Louis Kipnis, sworn to November 27, [407] 1953.

41. I charge the defendants and plaintiffs' New York counsel with collusion in submitting the action to the Nevada court.

42. I charge the defendant Howard R. Hughes with purporting to remove himself from this jurisdiction and to Las Vegas, Nevada, after the commencement of this action and before the commencement of the Nevada action as part and parcel of a plan to deprive this Court of jurisdiction and to confer jurisdiction to the State of Nevada.

43. I charge plaintiffs' New York counsel with failing to truly represent the stockholders of RKO in this action and charge further that the proceedings in Nevada are not truly adversary.

44. I charge plaintiffs' New York counsel with the responsibility of plaintiffs' default on Mr. Hughes' motion to quash service on him, and I charge further that this default was part and parcel of the plan and determination between plaintiffs' New York counsel on the one hand and defendants to deprive this Court of jurisdiction and to confer jurisdiction on the Nevada court.

45. I charge defendants, plaintiffs' New York counsel, and others with a plan, scheme and determination to abandon the California action, to have it dismissed without my knowledge and consent, and as part of the over-all plan to deprive this Court of jurisdiction.

46. I charge the defendants and plaintiffs' New York counsel with complete disinterest and indifference to the rights and interests of the thousands of stockholders of RKO [408]

Wherefore I respectfully pray this Court to grant the motion herein in all respects.

/s/ BERNARD REICH.

Subscribed and sworn to before me this 1st day of February, 1954.

[Seal]      /s/ HELEN SPARKMAN,  
Notary Public in and for the County of Los Angeles, State of California.

Affidavit of Service by Mail attached.

[Endorsed]: Filed February 4, 1954. [409]

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[Title of District Court and Cause.]

NOTICE OF INTENTION TO APPLY FOR  
DEPOSITION OF HOWARD R. HUGHES

To the Defendants and to Their Attorneys:

Please Take Notice that on February 15, 1954, at 10 a.m., or as soon thereafter as counsel can be heard, in the courtroom of District Judge Ben Harrison, Federal Building, Los Angeles, California, the undersigned will apply to the Court for leave to take the deposition of Howard R. Hughes as an officer, director and/or employee of the defendant RKO Radio Pictures, Inc., in aid of the motions duly noticed for the same day pursuant to Rules 53 and 60 of the Federal Rules of Civil Procedure.

This notice is given notwithstanding and without prejudice to the taking of the deposition without

application therefor, as [411] a courtesy to the Court and to counsel.

Dated: February 3, 1954.

/s/ BERNARD REICH,  
Attorney for Plaintiffs.

Affidavit of service by mail attached.

[Endorsed]: Filed February 4, 1954. [412]

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[Title of District Court and Cause.]

MINUTES OF THE COURT—FEB. 15, 1954

Present: Hon. Ben Harrison,  
District Judge.

Counsel for Plaintiffs: Bernard Reich;  
Robert Silver.

Counsel for Defendants: Raymond A.  
Cook for def't Howard R. Hughes;  
Guy Knupp for def't RKO Radio Pict.,  
Inc.

Proceedings:

For hearing (1) motion of plaintiffs to vacate in part order docketed and entered Jan. 12, 1954, and for other relief; and (2) application of plaintiffs for leave to take the deposition of Howard R. Hughes, pursuant to motion, notice, memo. of points and authorities, and affidavit of Bernard Reich, and notice of intention to apply for deposition of Howard R. Hughes, filed Feb. 4, 1954.

Attorney Reich makes a statement to the Court.

The Court makes a statement to Attorney Reich that the Court will give Attorney Reich time to show that he has authority to appear for plaintiffs.

Attorney Reich makes a further statement.

The Court makes a further statement.

Attorney Cook makes a statement to the Court.

The Court Orders said motion (1) and application (2) continued to March 29, 1954, 10 a.m., for hearing.

Attorney Reich makes a statement to the Court of objection to Robert Silver appearing for plaintiffs.

EDMUND L. SMITH,  
Clerk.

By MURRAY E. WIRE,  
Deputy Clerk. [431]

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[Title of District Court and Cause.]

## RENOTICE OF MOTION FOR APPOINTMENT OF SPECIAL MASTER

To the Defendants and to Their Attorneys:

Please Take Notice that on March 29, 1954, at 10 a.m., in the courtroom of the Hon. Ben Harrison, Federal Building, Los Angeles, California, the undersigned will renew motion dated November 12, 1953, "For Appointment of Special Master Pursu-

ant to Rule 53 of the Federal Rules of Civil Procedure," which motion went off calendar by order of the Court on December 14, 1953, subject to being renewed.

Dated: March 8, 1954.

/s/ BERNARD REICH,  
Attorney for Plaintiffs.

Affidavit of service by mail attached.

[Endorsed]: Filed March 11, 1954. [432]

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[Title of District Court and Cause.]

MOTION TO ADD AND JOIN PARTIES  
PLAINTIFF OR FOR LEAVE TO INTER-  
VENE

Comes Now the plaintiffs and the proposed interveners, Julius November and Eleanor November and hereby petition and move the Court as follows:

1. To add and join as party plaintiffs Julius November and Eleanor November.
2. To allow the said Julius November and Eleanor November to intervene and become parties plaintiffs herein.

Said motion will be made on the following grounds:

1. Julius November and Eleanor November are each shareholders of record of RKO Pictures Corporation, one of the defendants herein.

2. Said Julius November and Eleanor November have a joint interest with the plaintiffs, and in any event have an interest [436] in respect of or arising out of the same transactions, occurrences, or series of transactions or occurrences, alleged in the amended complaint herein.

3. Said Julius November and Eleanor November are members of the class of shareholders purportedly represented by plaintiffs in this action; and the representation of their interest herein is inadequate and they are or may be bound by a judgment in this action.

4. The claims of said Julius November and Eleanor November and this action have questions of law and fact in common.

5. The addition, joinder or intervention of the said Julius November and Eleanor November will not delay, unduly or otherwise, or prejudice the adjudication of the rights of the parties hereto and is required in the interests of justice and to assure true adversary proceedings.

Dated: March 5, 1954.

/s/ BERNARD REICH,

Attorney for Plaintiffs and  
Proposed Interveners.

[Endorsed]: Filed March 11, 1954. [437]

[Title of District Court and Cause.]

### PETITION

The proposed interveners, or proposed additional parties plaintiff herein, for their petition allege:

1. Petitioners are residents of and have their domicile in the State of New York.

2. Petitioners are shareholders of record of RKO Pictures Corporation, defendant herein, and have been such continuously since January 8, 1951, and previously of the predecessor of RKO Pictures Corporation, to wit, Radio-Keith-Orpheum Corporation, since on or before January 1, 1948, and at the times of some of the transactions and acts complained of in this action.

3. Petitioners had been record holders of 700 shares of the predecessor corporation until on or about January 8, 1951 when, pursuant to consent decree the shares of stock in the successor [438] corporation were exchanged. Julius November is the record holder of 200 shares of stock in the defendant RKO Pictures Corporation and Eleanor November is the record holder of 150 shares of stock of the said defendant.

4. In 1953 petitioners sought to retain Bernard Reich to represent them in this action. Mr. Reich referred them to another attorney who as yet has been unsuccessful in obtaining the Nevada Court's leave to intervene in that action pending in the Eighth Judicial District Court of the State of Ne-

vada, in and for the County of Clark, entitled Castleman vs. Walker, et al., and bearing Case No. 59,422.

5. Petitioners have now retained Mr. Reich, who has accepted the retainer to represent petitioners in this action.

6. Petitioners incorporate by reference the affidavits of Bernard Reich heretofore made and on file in this action, including:

(a) Affidavit of Bernard Reich in Support of Motion to Vacate Order of Dismissal, sworn to September 9, 1953.

(b) Reply Affidavit of Bernard Reich in Opposition to Motion and Affidavit of Raymond A. Cook as Amicus Curiae, sworn to October 2, 1953.

(c) Reply Affidavit of Bernard Reich to Affidavit of Louis Kipnis and Leo B. Mittelman, sworn to October 1, 1953.

(d) Reply Affidavit of Bernard Reich to Affidavit of Roy W. McDonald, sworn to October 2, 1953.

(e) Affidavit of Bernard Reich in Support of Motion for the Appointment of a Special Master, sworn to November 13, 1953.

(f) Affidavit of Bernard Reich in Reply to [439] Affidavit of Louis Kipnis, sworn to November 27, 1953.

(g) Affidavit of Bernard Reich in Support of Motion to Vacate Part of Order of January 12, 1954, and for Other Relief, sworn to February 1, 1954.

7. These affidavits demonstrate that the interests of all the stockholders are not adequately represented herein because of the acts and conduct of plaintiffs' New York attorneys.

8. Petitioners have been informed and therefore allege on information and belief that the amended complaint was prepared by Mr. Reich and petitioners hereby elect to adopt the said pleading as their own.

9. Intervention will not delay or prejudice the adjudication of the rights of the parties hereto and is required in the interests of justice and to assure adequate representation for and in the best interests of all the stockholders.

10. Petitioners have no interest in conflict with the RKO corporations or have any interest other than what is consistent with the welfare of the stockholders.

11. This application is timely made for the reason that petitioners did not know of any claimed inadequate representation until either late in September or early in October, 1953, when the difficulty in this Court was printed in the press.

Moreover it was not until December 22, 1953, that the order denying petitioners' motion in the Nevada action was made.

Wherefore petitioners pray for an order granting the intervention.

Dated: March 5, 1954.

/s/ BERNARD REICH,

Attorney for Petitioners.

Duly verified.

[Endorsed]: Filed March 11, 1954. [440]

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[Title of District Court and Cause.]

AFFIDAVIT OF BERNARD REICH IN SUP-  
PORT OF MOTION TO ADD AND JOIN  
PARTIES PLAINTIFF

State of California,  
County of Los Angeles—ss.

Bernard Reich being first duly sworn, deposes and says:

1. I am the attorney for the plaintiffs and make this affidavit in support of the motion to add Julius and Eleanor November as parties plaintiffs herein.

2. Said proposed parties have a joint interest with the plaintiffs, and in any event have an interest in respect of or arising out of the same transactions, occurrences, or series of transactions or occurrences, alleged in the amended complaint herein.

3. Said proposed parties are members of the class of shareholders in part represented by the plaintiffs in this action. [442]

4. The claims of the said proposed parties and

this action have questions of law and fact in common.

5. The addition of the said proposed parties will not delay or prejudice the adjudication of the rights of any of the parties hereto and is required in the interests of justice.

/s/ BERNARD REICH.

Subscribed and sworn to before me this 10th day of March, 1954.

[Seal]      /s/ HELEN SPARKMAN,  
Notary Public in and for the County of Los Angeles,  
State of California.

[Endorsed]: Filed March 11, 1954. [443]

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[Title of District Court and Cause.]

# MINUTES OF THE COURT—MARCH 29, 1954

Present: Hon. Ben Harrison,  
District Judge.

Counsel for Plaintiffs and Proposed Interveners: Bernard Reich;

Counsel for Defendant Howard R. Hughes: Raymond A. Cook;

Counsel for Defendant: RKO Radio Pictures, Inc.: Roy W. McDonald and Geo. Benedict;

Counsel for Plaintiffs: Robert Silver and Leo B. Mittelman, Esqs.

## Proceedings:

For hearing (1) motion of plaintiffs to vacate in part order docketed and entered Jan. 12, 1954, and for other relief; (2) application of plaintiffs for leave to take the deposition of Howard R. Hughes; pursuant to motion, notice, memo. of points and authorities, and affidavit of Bernard Reich, and notice of intention to apply for deposition of Howard R. Hughes, filed Feb. 4, 1953; (3) further hearing motion of Bernard Reich, Esq., Local Attorney of Record for the plaintiffs for appointment of a Special Master, pursuant to Rule 53 of FRCP, and pursuant to motion, affidavit of Bernard Reich, filed Nov. 16, 1953, and renote of hearing, filed March 11, 1954; and (4) motion of plaintiffs and the proposed interveners, Julius November and Eleanor November, to add and join parties plaintiff or for leave to intervene, pursuant to motion, petition, affidavit of Bernard Reich, and memo. of points and authorities, and notice, filed March 11, 1954.

At 10:40 a.m. court convenes herein. Attorney Reich makes a statement and suggests a continuance of hearing above motions until April 12, 1954.

On motion of Robert Silver, Esq., It Is Ordered that Leo B. Mittelman, Esq., of New York Bar may practice in this Court for the purposes of this case.

Attorney McDonald of the New York Bar, heretofore admitted to practice in this Court for the purposes of this case, makes a statement to the Court.

Attorney Reich makes a statement. The Court makes a statement. Attorney Reich makes a further statement.

Attorney Mittelman makes a statement to the Court. The Court makes a further statement.

At 11:23 a.m. court recesses. At 11:33 a.m. court reconvenes herein, and all being present as before, Court orders trial proceed.

Attorney Reich makes a further statement. Court makes a further statement. Attorney McDonald makes a further statement. Attorney Reich makes a further statement.

Court Orders that all of the above motions on the calendar, to wit, (1), (2), (3), and (4) are continued to April 19, 1954, 11 a.m., for hearing, and also any motion that may be filed to dismiss by defendant RKO Radio Pictures, Inc., will also be heard on that day, viz., April 19, 1954, 11 a.m.

EDMUND L. SMITH,  
Clerk.

By MURRAY E. WIRE,  
Deputy Clerk. [470]

[Title of District Court and Cause.]

### MOTION TO DISMISS WITH PREJUDICE

Defendant RKO Radio Pictures, Inc., (herein called "Radio") respectfully moves this Court to enter its Final Judgment dismissing this action with prejudice.

The grounds of said motion are as follows:

1. On December 23, 1952, the plaintiffs in this action instituted an action, upon the same causes of action herein alleged, in the Eighth Judicial District Court of the State of Nevada (herein called "the Nevada Court"), County of Clark, at Las Vegas, naming, among others, Radio and Howard R. Hughes as defendants. This action is herein referred to as "the Castleman-Nevada action."

2. On April 1, 1954, the Nevada Court entered its Final Judgment in the Castleman-Nevada action, dismissing the same with prejudice, reserving jurisdiction solely for certain [471] ancillary proceedings related to the costs, if any, and fees, if any, allowable to plaintiffs in derivative and representative actions purportedly filed on behalf of RKO Pictures Corporation or its stockholders, wherever instituted or pending.

3. Prior to entry of such judgment, the Nevada Court directed that notice of hearing upon the motion to dismiss with prejudice the Castleman-Nevada action be given to all stockholders of RKO Pictures Corporation; such notice in the form and manner

prescribed by the Nevada Court was duly given to each record stockholder (as of February 24, 1954) of RKO Pictures Corporation; the motion to dismiss was duly heard by the Nevada Court beginning March 22, 1954; and the Nevada Court entered its Interlocutory Order and Findings of Fact and Conclusions of Law on March 30, 1954.

4. Julius and Eleanor November, applicants to intervene in this Court, were duly represented in the Nevada Court by Nevada counsel, and were accorded full opportunity to participate in such hearing.

5. The final order of dismissal with prejudice duly entered by the Nevada Court on April 1, 1954, bars any further prosecution of this action.

The motion will be based on the following:

1. The records and files of this Court.
2. The Notice of Hearing thereon.
3. The affidavit of Roy W. McDonald in support of this motion.
4. Certified copies of proceedings in the Castleman-Nevada action, including the motion to dismiss with prejudice, the notice to stockholders, the Interlocutory Order and the Findings of Fact and Conclusions of Law dated March 30, 1954, the motion for final judgment and supporting affidavit [472] dated April 1, 1954, and the Final Judgment dated April 1, 1954. Such certified copies will be offered in evidence at the hearing on this motion.

5. Radio's Memorandum of Points and Authorities.

Dated: April 5, 1954.

MITCHELL, SILBERBERG &  
KNUPP,

By /s/ GEORGE BENEDICT, JR.,  
Attorneys for RKO Radio  
Pictures, Inc.

[Endorsed]: Filed April 7, 1954. [473]

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[Title of District Court and Cause.]

AFFIDAVIT OF ROY W. McDONALD IN  
SUPPORT OF MOTION TO DISMISS  
WITH PREJUDICE

State of California,  
County of Los Angeles—ss.

Roy W. McDonald, being duly sworn, on oath  
says:

1. I am a member of the bars of the States of New York and Texas, of the Supreme Court of the United States, and of a number of the Courts of Appeal and the District Courts of the United States; am a partner in the firm of Donovan, Leisure, Newton & Irvine of New York, N. Y., who appear of counsel for the defendant RKO Radio Pictures, Inc. (herein called "Radio"); and have been duly admitted by

Order of this Court to appear as one of the counsel for Radio in this proceeding.

2. I make this affidavit in support of the motion of Radio to dismiss this action with prejudice.

3. On December 23, 1952, the identical plaintiffs herein, Eli B. Castleman, et al., instituted an action in the Eighth [474] Judicial District Court of the State of Nevada, County of Clark, at Las Vegas, Nevada, against J. Miller Walker, Francis J. O'Hara, Jr.; Howard R. Hughes (herein referred to as "Hughes"), Noah Dietrich, Ned E. Depinet, Hughes Tool Company, RKO Pictures Corporation (herein referred to as "RKO"), and Radio. This action is referred to herein as "the Castleman-Nevada action." The complaint in such action and the amended complaint subsequently filed embrace the identical causes of action set forth in this California action.

4. In the Castleman-Nevada action the several defendants duly appeared and answered. Some twenty-one witnesses were examined orally by plaintiffs, and over one hundred forty documentary exhibits were marked for identification. The case was set for trial early in January, 1954, but at the time it was reached, the New York counsel of plaintiffs were subject to a stay order issued by a New York court preventing them from proceeding with the trial of the action. Such stay was subsequently vacated by the New York court, but in the meantime the Nevada Court had reset the Castleman-Nevada case for trial in August, 1954.

5. On February 7, 1954, Hughes made an offer to purchase all the assets of RKO, "including any and all claims or causes of action of every kind or character against, or which might be asserted against, any person or persons, including" Hughes, for \$23,489,478.00 in cash. A copy of such offer is attached hereto as "Exhibit A." This offer was subject to certain conditions, all of which were subsequently satisfied. On March 18, 1954, the stockholders of RKO, at a special meeting called for the purpose, approved the sale of assets pursuant to such offer. Of the total 3,891,526 shares entitled to vote, 3,358,116 shares were voted in favor of acceptance of the offer, and 73,227 against. Excluding the shares owned by Hughes, 2,022,769 were voted in favor of acceptance of the offer, which was in excess of 50% of the outstanding stock. On March 31, 1954, at Wilmington, Delaware, the sale [475] of such assets was consummated by Hughes paying to RKO the above sum in cash and by RKO's transferring to Hughes all of its assets.

6. On February 11, 1954, Hughes filed a motion in the Castleman-Nevada action praying that such action, which was the only action in which he had been validly served or had answered, be dismissed with prejudice. A copy of such motion is attached hereto as "Exhibit B." On February 11, 1954, the Nevada Court set such motion for hearing on March 22, 1954, and directed that RKO give notice of such hearing to each of its stockholders by mailing such Notice, in the form prescribed by the order of the

Nevada Court (as amended February 16, 1954) to each such stockholder with the proxy statement relating to the special meeting of stockholders to be held March 18, 1954, for the purpose of voting upon Hughes' offer. A copy of such Notice, in the form prescribed by the Nevada Court, is attached as "Exhibit C." Such Notice was duly mailed to all stockholders of RKO together with the proxy statement, on or about March 1, 1954.

7. On March 22, 1954, the motion to dismiss came on for hearing before the Hon. Frank McNamee, Judge of the Nevada Court. The plaintiffs herein, Eli B. Castleman, et al., appeared therein by their counsel, David Zenoff, Esq., of the Nevada bar, and Louis Kipnis and Leo B. Mittelman, of the New York bar. All defendants appeared by their counsel of record. Among the stockholders present in person or by counsel were Julius and Eleanor November, applicants to intervene here, who were represented by Nevada counsel, and who were advised in open court that they were free to participate fully in the hearing and to interrogate any witnesses. In addition to hearing witnesses who testified in person, the Nevada Court received in evidence numerous exhibits, including, among other exhibits, all the depositions taken in the Nevada case, the pleadings in the various stockholders derivative and representative actions heretofore filed in various jurisdictions [476] purporting to be prosecuted on behalf of RKO or its stockholders, and certain affidavits filed in support of and in

opposition to an application pending in the Supreme Court of New York, seeking the appointment of a receiver for all the New York assets of RKO and Radio.

8. The Nevada Court took the motion under submission at the close of the hearing on March 23, 1954, and on March 30, 1954, entered its Interlocutory Order and filed Findings of Fact and Conclusions of Law.

9. Such Interlocutory Order recited, among other things, that Hughes had offered to purchase all the assets of RKO; that the consummation of such sale would extinguish all claims and causes of action asserted, or which may be asserted, against Hughes by or on behalf of RKO; that the offer when consummated will result in a compromise of all derivative and representative actions; and that the offer by Hughes is fair and reasonable and that the sale should be approved as a compromise and settlement of the action. The Interlocutory Order accordingly approved the sale pursuant to the provisions of Rule 23 (c) of the Nevada Rules of Civil Procedure, such rule being in its terms similar to Rule 23 (c) of the Federal Rules of Civil Procedure. The Interlocutory Order provided for entry of a Final Order at any time within ten days, without further notice, upon an affidavit showing that the purchase agreement had been consummated.

10. The Findings of Fact and Conclusions of Law of the Nevada Court consisted of 231½ legal-

sized typed pages, containing numbered paragraphs setting forth extensive findings from the evidence before that Court. Included among such findings and conclusions were:

a. Paragraph 7: That five other derivative actions are pending in various jurisdictions "alleging the same charges and seeking the same or similar relief. \* \* \* In none [477] of these actions, except the instant" Nevada "one has the defendant Hughes been personally served or made an appearance." Paragraph 9 identified the Castleman-California action, in which this motion is made, as one of such five.

b. Paragraph 24 concluded that the method employed by the directors of RKO in examining the offer and recommending it to the stockholders was proper and that the offer included an "ample and fair consideration for the sale of the assets not capable of precise evaluation, including the derivative stockholders' actions."

c. Paragraph 26 found as a fact and concluded as a matter of law that the charges in the Nevada action and the evidence received covered the charges in the other actions and that "what I have found with respect to the charges of the complaint in the action before this Court applies with equal force to the charges of the complaints in these various other actions and forecloses prosecution on the merits of such other complaints."

d. Paragraph 37 found and concluded "that the

compromise which will be effected by the defendant Hughes' purchase of the corporate assets, pursuant to his offer, is fair and adequate; that it is in the interest of the corporation and its stockholders that the compromise effected by the offer be accepted; and that it is in the interest of the stockholders and the corporation that such compromise be approved and that this action be dismissed as to all defendants with prejudice."

e. Paragraph 38 took cognizance of the fact that charges had been made that the Nevada Court's jurisdiction is a product of collusion. Such charges or insinuations have been made in the present California-Castleman action. Paragraph 38 of the Nevada Court's findings and conclusions [478] noted that such charges had been denied, and then reviewed the circumstances preceding the institution of the Castleman-Nevada action. Paragraph 39 found as a fact and concluded as a matter of law "that this [Nevada] Court's jurisdiction is not a product of collusion of any type; that Howard R. Hughes resides and is domiciled in Nevada; that this action is, and has been conducted as a truly adversary proceeding; that plaintiffs have prosecuted this action diligently; that the stockholders of RKO have been fully and adequately represented by plaintiffs; and that the judgment dismissing this action with prejudice is binding upon all other stockholders of RKO."

11. On April 1, 1954, the fact of the consummation of the sale of assets on March 31, 1954, was

duly reported to the Nevada Court. On April 1, 1954, the Nevada Court entered its Final Judgment dismissing the Castleman-Nevada action with prejudice, finding and determining that there was no just cause for delay, directing that the judgment be forthwith entered as final, and reserving jurisdiction for the sole purpose of determining and allocating all costs and fees, if any, allowable to the plaintiffs in any stockholders' representative or derivative actions, wherever pending, and of hearing and determining the cross-motion of the Castlemans, et al., pending in the Nevada Court, for an award of costs and fees.

12. On February 16, 1954, one Louis Schiff and one Jacob Sack, alleging themselves to be stockholders of RKO, filed Civil Action No. 491 in the Court of Chancery of the State of Delaware in and for New Castle County, at Wilmington, Delaware, against RKO and certain individual defendants seeking to enjoin RKO from proceeding with the sale of its assets pursuant to the offer of Hughes on the alleged ground that the offer was "grossly inadequate, the inadequacy being so gross and extreme as to [479] display and constitute on its face, fraud." RKO filed its answer to such complaint on February 18, 1954, and the case was tried on its merits beginning March 8, 1954. On March 26, 1954, the Chancellor of the Delaware Court of Chancery handed down a 34-page opinion holding that the plaintiffs were not entitled to the relief sought, and

directing judgment on the merits in favor of RKO. Thereafter, such judgment was duly entered.

13. It is respectfully submitted that the above-outlined proceedings, which will be further authenticated by certified copies of the relevant documents from the Nevada and Delaware courts which will be put in evidence on the hearing of this motion, bar the prosecution of this action in this Court and justify this Court in dismissing this action on the merits, with prejudice.

14. It is further respectfully submitted that there are no ancillary issues before this Court requiring it to retain jurisdiction of this action for any purpose whatsoever. The Nevada Court has caused notice to be served on all plaintiffs in all representative and derivative actions, wherever pending, purporting to be brought on behalf of RKO or its stockholders, by notice to all counsel who have appeared for any such stockholders, directing such plaintiffs to show before the Nevada Court on April 5, 1954, any claims that they may have for reimbursement of expenses, if any, including attorneys' fees, if any, incident to any such action. Moreover, the plaintiffs Castleman, et al., have moved in the Nevada Court for such allowance. The Castlemans' claim, if any they have, for such expenses and fees, is a single and indivisible claim, and cannot properly be litigated piecemeal in several courts. Plaintiffs have put the matter in issue in the Nevada Court, and cannot also litigate it in this Court.

Wherefore, it is respectfully submitted that this action should be dismissed with prejudice.

/s/ ROY W. McDONALD.

Subscribed and sworn to before me this 2nd day of April, 1954.

[Seal]      /s/ LORETTO G. JONES,  
Notary Public in and for  
Said County and State.

My commission expires April 9, 1954. [480]

## EXHIBIT A

February 7, 1954.

RKO Pictures Corporation,  
1270 Avenue of the Americas,  
New York, New York.

Gentlemen:

I hereby offer to purchase from RKO Pictures Corporation all of its assets as of the date of transfer to me, including any and all claims or causes of action of every kind or character against or which might be asserted against, any person or persons, including me.

I agree to pay for such assets the sum of \$23,489,478 in cash upon transfer of the assets to me. (The total number of shares of stock outstanding of RKO Pictures Corporation is 3,914,913.

\$23,489,478 divided by 3,914,913 shares equals \$6 per share.)

This offer and all obligations of mine pursuant hereto are conditioned upon the following, and time in each instance is of the essence:

a. The assets shall be free and clear of all liens, charges, or encumbrances, except that I agree to the taking of such measures as may be considered necessary or proper for causing one or more of the operating subsidiaries of RKO Pictures Corporation to assume all liabilities of RKO Pictures Corporation prior to the transfer to me of the assets hereunder.

b. Acceptance of this offer not later than 6:00 p.m., Eastern Standard Time, February 15, 1954, by a duly constituted officer of RKO Pictures Corporation, pursuant to full authority and direction thereunto given him by the Board of Directors of RKO Pictures Corporation, and which acceptance must be unconditional except that it must be subject to approval by the stockholders of RKO Pictures Corporation, as hereinafter provided.

c. Approval of the acceptance of this offer not later than March 31, 1954, by the affirmative vote of a majority of the stock, other than stock owned by me, voting at a properly held stockholders' meeting of RKO Pictures Corporation, convened not later than March 30, 1954, at which a proposal to ratify the acceptance is properly before the meeting.

d. Approval of the acceptance of this offer at

the same meeting by affirmative vote of a majority of all of the issued and outstanding stock of RKO Pictures Corporation.

e. Adjournment of the said stockholders' meeting not later than 6:00 p.m., Eastern Standard Time, March 31, 1954, and the mailing to me of a certified copy of the resolution of the stockholders approving the acceptance of this offer not later than two (2) days following such adjournment.

f. The rendering to me of a written opinion by the attorneys for RKO Pictures Corporation no later than March 31, 1954, that sale and transfer to me of the assets pursuant to this offer has been duly and legally authorized by proper resolution of the Board of Directors of RKO Pictures Corporation and by proper resolution of the stockholders of said corporation.

g. Transfer to me of the assets sold pursuant to this offer shall be consummated not later than 10:00 a.m., Eastern Standard Time, April 2, 1954, either at the principal office of the Commercial Trust Company of New Jersey in the City of Jersey City and State of New Jersey, or at such other place as may be agreed upon by the parties hereto, and [481] such transfer shall be accompanied by a written opinion rendered to me from the attorneys for RKO Pictures Corporation that such transfer shall effectively pass to me full title and control of all assets covered hereby and subject to no liens or encumbrances whatsoever.

h. There shall have been no transfer of any substantial assets of RKO Pictures Corporation prior to transfer to me of the assets covered hereby pursuant hereto, except transfers in the normal course of business or with my written consent.

Failure of any of the foregoing conditions shall render any contract pursuant hereto null and void.

If this offer is accepted by the duly constituted and authorized officer as provided in subparagraph b above, then, at the said stockholders' meeting, I agree to vote 1,262,120 shares of stock of RKO Pictures Corporation presently owned by me to approve the acceptance of this offer.

In order to permit each RKO stockholder (other than me) to receive promptly his pro rata portion of the \$23,489,478 which will be paid to RKO upon compliance with the terms hereof, I agree that at the said stockholders' meeting convened not later than March 30, 1954, I will vote all of my stock in favor of a resolution to accomplish the following:

RKO Pictures Corporation will, in reduction of its capital, pay \$6 in cash per share for all shares (other than the 1,262,120 shares owned by me) tendered for redemption during the 60-day period following the adoption of this resolution, or during such longer period as may be considered desirable by the company's attorneys.

To assure protection to the stockholders of RKO Pictures Corporation against any possible assertion

of liability by any creditor of said corporation with respect to money received by any stockholder in the redemption of his shares, I agree to hold harmless each stockholder (whose stock is redeemed pursuant to any resolution such as above set forth) against any asserted liability for corporate debts, provided I am given reasonable notice of and an opportunity to defend against any such claim.

I hereby affirm that there is no offer outstanding to me for any of the assets which I propose to purchase hereunder.

I call your attention to the following:

a. There have been expressions of dissatisfaction among the stockholders.

b. I have been sued by certain of the the stockholders and accused of responsibility for losses of the corporation.

c. I would like to feel that I have given all the stockholders of RKO Pictures Corporation an opportunity to receive for their stock an amount well in excess of its market value at the time when I first became connected with the company, or at any time since.

/s/ HOWARD R. HUGHES,

HOWARD R. HUGHES. [482]

## “EXHIBIT B”

In the Eighth Judicial District Court of the State  
of Nevada, in and for the County of Clark

Case No. 59422—Dept. No. 1

ELI B. CASTLEMAN and MARION V. CASTLE-  
MAN, Doing Business as WOLVERINE TEX-  
TILE COMPANY, and LOUIS FEUERMAN,

Plaintiffs,

vs.

J. MILLER WALKER, FRANCIS J. O'HARA,  
JR., HOWARD R. HUGHES, NOAH DIET-  
RICH, NED E. DEPINET, HUGHES TOOL  
COMPANY, RKO PICTURES CORPORA-  
TION, RKO RADIO PICTURES, INC.,  
JAMES R. GRAINGER and A. DEE SIMP-  
SON,

Defendants.

## MOTION TO DISMISS

The defendant, Howard R. Hughes, moves the  
court to dismiss with prejudice the action against  
all defendants for the reasons set forth below:

1. On February 7, 1954, by the instrument at-  
tached to this motion as Exhibit “A,” this defend-  
ant offered to purchase all of the assets of RKO  
Pictures Corporation.

2. Such offer, if accepted by the corporation and  
approved by the stockholders, will effectively ex-  
tinguish all claims and causes of action against this

defendant and will render this pending action moot as to this defendant.

3. Also, if such offer is accepted by the corporation and approved by the stockholders, it will vest in this defendant all claims and causes of action of RKO Pictures Corporation against the defendants J. Miller Walker, Francis J. O'Hara, Jr., Noah Dietrich, Ned E. Depinet, Hughes Tool Company, James R. Grainger, and A. Dee Simpson, and will vest in this defendant all of the capital stock of RKO Radio Pictures, Inc.; and this defendant hereby asserts that he will not prosecute against such defendants any claim or cause of action which may be vested in him, and will not permit to be prosecuted any claims or causes of action against the said named defendants on behalf of RKO Radio Pictures, Inc.

4. The order of dismissal may recite that the cause shall be reinstated in the event that the sale is not consummated pursuant to the offer.

WOODBURN, FORMAN &  
WOODBURN,

206 N. Virginia Street,  
Reno, Nevada, and

T. A. SLACK,

7000 Romaine Street, Hollywood 38, California, Attorneys for Defendant, Howard R. Hughes. [483]

## “EXHIBIT C”

Notice Pursuant to Order Entered February 11, 1954, of Hon. Frank McNamee, Judge of the Eighth Judicial District Court of the State of Nevada in and for the County of Clark

In the Eighth Judicial District Court of the State of Nevada, in and for the County of Clark

Case No. 59422—Dept. No. 1

ELI B. CASTLEMAN and MARION V. CASTLEMAN, Doing Business as WOLVERINE TEXTILE COMPANY, and LOUIS FEUERMAN,  
Plaintiffs,

vs.

J. MILLER WALKER, FRANCIS J. O'HARA, JR., HOWARD R. HUGHES, NOAH DIETRICH, NED E. DEPINET, HUGHES TOOL COMPANY, RKO PICTURES CORPORATION, RKO RADIO PICTURES, INC., JAMES R. GRAINGER and A. DEE SIMPSON,

Defendants.

## NOTICE OF COURT HEARING

You are hereby notified that in the event that the stockholders of RKO Pictures Corporation at the meeting of stockholders to be held on March 12, 1954,\* shall approve the sale of the assets of RKO

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\*By Order of the Court dated February 16, 1954, the notice was amended so as to change this date to March 18, 1954.

Pictures Corporation pursuant to the terms of the offer of Howard R. Hughes, there will be presented to the Eighth Judicial District Court of the State of Nevada, County of Clark, at Las Vegas, Nevada, on the 22nd day of March, 1954, the motion of the defendant, Howard R. Hughes, to dismiss with prejudice the cause pending in said court, being Case No. 59422, Eli B. Castleman, et al., vs. J. Miller Walker, et al. A copy of such Motion to Dismiss is attached to this Notice.

You are notified of the pendency of the hearing upon such motion on the 22nd day of March, 1954, in order that you may take any action with respect thereto before this court which may be proper.

[Endorsed]: Filed April 7, 1954. [484]

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[Title of District Court and Cause.]

## AFFIDAVIT OF JULIUS NOVEMBER

State of New York,  
County of New York—ss.

Julius November being first duly sworn, deposes and says:

1. I am one of the proposed interveners and petitioners in the above action.

2. I have read the Petition filed by Bernard Reich in my wife Eleanor and my behalf and I incorporate said Petition in this affidavit as if I were

to repeat and reallege the allegations contained therein.

3. I confirm that Bernard Reich is our attorney and authorized to appear for us in this action.

/s/ JULIUS NOVEMBER.

Subscribed and sworn to before me this 1st day of April, 1954.

/s/ EDWARD L. GLAZER,

Notary Public, State of New  
York.

Term Expires March 30, 1956.

Affidavit of Service by Mail attached.

[Endorsed]: Filed April 12, 1954. [485]

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[Title of District Court and Cause.]

### AFFIDAVIT

State of New York,  
County of New York—ss.

Louis Kipnis, being duly sworn, deposes and says: I am one of the attorneys for the plaintiffs in the above-entitled action.

I have examined the affidavit of Roy W. McDonald in support of the motion of defendant RKO Radio Pictures, Inc., to dismiss this action with prejudice.

I have also examined memorandum of points and authorities and the motion.

In the light of the facts and circumstances set forth in all the documents above referred to and in turn incorporated by reference, plaintiffs do not oppose the within motion.

/s/ LOUIS KIPNIS.

Sworn to before me this 12th day of April, 1954.

/s/ AARON SCHWARTZ,

Notary Public, State of New  
York.

Term Expires March 30, 1956.

Affidavit of Service by Mail attached.

[Endorsed]: Filed April 15, 1954. [487]

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[Title of District Court and Cause.]

# MINUTES OF THE COURT—APRIL 19, 1954

Present: Hon. Ben Harrison,  
District Judge.

Counsel for Plaintiffs: no appearance;

Counsel for Defendants: no appearance;

Proceedings:

For hearing (1) motion of plaintiffs to vacate in part order docketed and entered Jan. 12, 1954, and for other relief;

(2) Application of plaintiffs for leave to take the deposition of Howard R. Hughes; pursuant to motion, notice, memo of points and authorities, and affidavit of Bernard Reich, and notice of intention to apply for deposition of Howard R. Hughes, filed Feb. 4, 1953;

(3) Further hearing of Bernard Reich, Esq., Local Attorney of Record for the plaintiffs for appointment of a Special Master, pursuant to Rule 53 of FRCP, and pursuant to motion, affidavit of Bernard Reich, filed, filed Nov. 16, 1953, and renote of hearing, filed March 11, 1954;

(4) Motion of plaintiffs and the proposed Intervenor, Julius November and Eleanor November, to add and join parties plaintiff, or for leave to intervene, pursuant to motion, petition, affidavit of Bernard Reich, and memo. of points and authorities, and notice, filed March 11, 1954;

(5) Motion of defendant RKO Radio Pictures, Inc., for dismissal of this action with prejudice, pursuant to notice, motion, points and authorities, and affidavit, filed April 7, 1954.

It is Ordered that cause is continued to May 17, 1954, 11 a.m., for hearing motions (1) to (4), incl., and continued to June 28, 1954, 11 a.m., for hearing motion (5), pursuant to order filed April 15, 1954.

EDMUND L. SMITH,  
Clerk.

By MURRAY E. WIRE,  
Deputy Clerk. [489]

[Title of District Court and Cause.]

MINUTES OF COURT—MAY 17, 1954

Present: Hon. Ben Harrison,  
District Judge.

Counsel for Plaintiffs: Bernard Reich,  
local counsel for plaintiffs and prop-  
posed intervenors;

Counsel for Defendants: George Benedict,  
Jr., for def't. RKO Radio Pictures, Inc.

Proceedings:

For (1) hearing motion of plaintiffs to vacate in part order docketed and entered Jan. 12, 1954, and for other relief;

(2) Application of plaintiffs for leave to take the deposition of Howard R. Hughes; pursuant to motion, notice, memo. of points and authorities, and affidavit of Bernard Reich, and notice of intention to apply for deposition of Howard R. Hughes, filed Feb. 4, 1954;

(3) Further hearing on motion of Bernard Reich, Esq., local attorney of record for the plaintiffs for appointment of a Special Master, pursuant to Rule 53 of FRCP, and pursuant to motion, affidavit of Bernard Reich, filed Nov. 16, 1953, and renoteice of hearing, filed March 11, 1954;

(4) Hearing motion of plaintiffs and the proposed intervenors, Julius November and Eleanor

November, to add and join parties plaintiff, or for leave to intervene, pursuant to motion, petition, affidavit of Bernard Reich, and memo. of points and authorities, and notice, filed March 11, 1954;

(5) Hearing motion of plaintiffs to quash depositions noticed by Louis Kipnis, Leo B. Mittelman, and Robert Silver, Esqs., purported attorneys for plaintiffs, as noticed April 9, 1954, of witnesses,

Benjamin F. Schwartz,

Tom Pryor,

Joe Schoenfeld,

John Doe (Hollywood Editor Associated Press),

Richard Roe (Hollywood Editor United Press),

Mickey Rudin,

Solomon Gelfand,

Phil Wershil,

Ed Schweid,

Julius November,

Eleanor November, and

Bernard Fischman,

pursuant to notice, motion, affidavit of Bernard Reich, and Memo. of Points and authorities, filed April 15, 1954.

Each of Attorneys Reich and Benedict makes a statement.

Court makes a statement and Orders cause con-

tinued to June 28, 1954, 11 a.m., for hearing as set forth above, on the Court's own motion.

EDMUND L. SMITH,  
Clerk.

By MURRAY E. WIRE,  
Deputy Clerk. [490]

EXHIBIT No. 1

[Attached to Affidavit of George Benedict, Jr.]

Case No. 59422

Dept. No. 1

In the Eighth Judicial District Court of the State of  
Nevada in and for the County of Clark

ELI B. CASTLEMAN and MARION V. CASTLE-  
MAN, Doing Business as Wolverine Textile  
Company, and Louis Feuerman,

Plaintiffs,

vs.

J. MILLER WALKER, et al.,

Defendants.

MOTION

To Said Honorable Court:

The defendants, RKO Pictures Corporation and  
RKO Radio Pictures, Inc., (herein collectively re-  
ferred to as RKO) move this Court on the affidavit  
of A. W. Ham, Jr., sworn to on March 17, 1954,

and the exhibits attached thereto and for the reasons stated therein for an order:

(a) determining what portions, if any, of the sum which will be paid to defendant RKO Pictures Corporation by defendant Howard R. Hughes, in the event said Hughes purchases all of RKO Picture Corporation's assets, shall be allocated for payment of the costs, if any, and disbursements, if any, of all plaintiffs in all of the stockholders' actions wherever now pending, purporting to be brought on behalf of the stockholders, or any of them, of defendant RKO Pictures Corporation or on behalf of said defendant against Howard R. [493] Hughes and other individual defendants and Hughes Tool Company, including in said sum such amount, if any, as the Court may determine represents a fair and reasonable allowance for counsel fees, if any, and other lawful expenses, if any, in connection with the prosecution of any and all said stockholders' actions, derivative and/or representative; and

(b) determining and fixing the respective interests, if any, in said allocated fund, if any, of each of the plaintiffs in each of the various stockholders' actions, derivative and/or representative, wherever they are now pending;

(c) directing that the RKO defendants upon proof of payment of the respective interests, if any, as determined and fixed by this Court in accordance with paragraphs (a) and (b) above, either to the party or into the registry of this Court for the ac-

count of such party, be released and discharged from any and all liability to each of the plaintiffs in each of the various stockholders' actions, derivative and/or representative, wherever they are now pending, in connection with said plaintiffs' costs, if any, and disbursements, if any, in said actions as such costs and disbursements are described in paragraph (a) above; and

(d) for such other and further relief as the RKO defendants may prove themselves to be entitled to receive.

Dated: March 17, 1954.

HAM & HAM and

DONOVAN, LEISURE,

NEWTON & IRVINE,

Attorneys for Defendants RKO Pictures Corporation and RKO Radio Pictures, Inc.,

By /s/ A. W. HAM, JR.,

A. W. HAM, JR.

[Endorsed]: Filed March 19, 1954, Nevada District Court. [494]

## EXHIBIT No. 2

[Attached to Affidavit of George Benedict, Jr.]

Case No. 59422

Dept. No. 1

In the Eighth Judicial District Court of the State of  
Nevada in and for the County of Clark

ELI B. CASTLEMAN and MARION V. CASTLE-  
MAN, Doing Business as Wolverine Textile  
Company, and LOUIS FEUERMAN,

Plaintiffs,

vs.

J. MILLER WALKER, et al.,

Defendants.

## ORDER

Upon reading and filing the motion of RKO Pictures Corporation and RKO Radio Pictures, Inc., (herein collectively called "RKO") together with the affidavit of A. W. Ham, Jr., sworn to on March 17, 1954, and the exhibits attached thereto, in support of such motion, it is

Ordered, that the motion of RKO for a hearing and determination as to what portion, if any, of the sum which will be paid by the defendant Hughes for all of the assets of defendant RKO Pictures Corporation, if such sale be consummated, shall be allocated for payment of all costs and disbursements, if any, including all counsel fees, if any, and all other lawful expenses, if any, of all plaintiffs in all stockholders' actions, derivative and/or representative, wherever now pending; and

For a hearing and determination as to the [515] apportionment of such sum, if any, among all such plaintiffs to the extent any such plaintiffs shall show themselves entitled to participate in such fund; and

For such other and further relief as movants may show themselves entitled to receive:

Shall be set before this Court at Las Vegas, Nevada, on the 5th day of April, 1954, at 9:30 a.m.

Ordered Further, that the plaintiffs herein are hereby stayed from prosecuting their cross-motion, presently returnable March 22, 1954, for costs and disbursements until after the hearing and determination of the aforesaid motion of the RKO defendants.

Ordered Further, that service of a copy of this order, together with a copy of the RKO defendants' aforesaid Motion and the affidavit in support thereof, on the plaintiffs and their attorneys in each of the pending stockholders' actions derivative and/or representative, wherever now pending, made by mailing copies of said papers in securely post-paid wrappers, registered mail, return receipt requested, to each attorney who has appeared on behalf of the plaintiffs in each of the said stockholders' actions, on or before March 22, 1954, shall be deemed sufficient notice to said plaintiffs and their attorneys of the pendency of said motion by the RKO defendants. Where a plaintiff is represented by one or more firms of attorneys, service shall be sufficient if such copies are mailed to each such firm, directed to

the firm name appearing on the respective complaints.

A. S. HENDERSON.

[Endorsed]: Filed March 20, 1954, Nevada District Court. [516]

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EXHIBIT No. 3

[Attached to Affidavit of George Benedict, Jr.]

Case No. 59422

Dept. No. 1

In the Eighth Judicial District Court of the State of  
Nevada in and for the County of Clark

ELI B. CASTLEMAN and MARION V. CASTLE-  
MAN, Doing Business as WOLVERINE TEX-  
TILE COMPANY, and LOUIS FEUERMAN,  
Plaintiffs,

vs.

J. MILLER WALKER, FRANCIS J. O'HARA,  
JR., HOWARD R. HUGHES, NOAH DIET-  
RICH, NED E. DEPINET, HUGHES TOOL  
COMPANY, RKO PICTURES CORPORA-  
TION and RKO RADIO PICTURES, INC.,  
Defendants.

FINDINGS OF FACT AND  
CONCLUSIONS OF LAW

A. Nature of Action and Motion

1. Defendant Howard R. Hughes (hereinafter called "Hughes") has moved to dismiss with preju-

dice this stockholders' derivative action brought on behalf of defendants RKO Pictures Corporation (hereinafter called "RKO") and its wholly-owned subsidiary, RKO Radio Pictures, Inc., (hereinafter called "Radio"), on the ground that acceptance of his offer to purchase all the assets of RKO for \$23,-489,478.00 and consummation of such sale pursuant to the offer will effectively extinguish all claims and causes of action against him asserted or which may be asserted by or on behalf of such corporation and/or any of its wholly-owned subsidiaries and will make this action against them moot; and on the ground that consummation of such sale will vest in him all claims and causes of action of RKO and/or Radio (hereinafter sometimes referred to collectively as "the RKO corporations") which [518] claims or causes of action he will not prosecute and will not permit to be prosecuted.

2. By this Court's Order, entered February 11, 1954, as amended February 16, 1954, hearing on the motion to dismiss was set for March 22, 1954, and pursuant to motion of the defendant Hughes, notice of such hearing in a form approved by this Court was directed to be given to all the stockholders of RKO. Such notice was duly and timely given by mailing a copy of this notice to each stockholder with the proxy statement, and the hearing began on March 22, 1954.

3. Pursuant to Rule 23 (c) of the Nevada Rules of Civil Procedure I have examined into the fairness of the offer submitted by Hughes since the

Federal Court in Los Angeles, California. On March 4, 1953, an amended complaint was filed which added some detailed charges but did not change the nature of the basic claims asserted. This California action alleges both of the causes of action asserted in the present Nevada action.

10. Friedman, California, (state court): On April 20, 1953, Milton Friedman instituted a suit in a state court in California alleging the second cause of action asserted in the present Nevada action.

11. Friedman, California (Federal Court): On April 27, 1953, the same Milton Friedman instituted another action in a Federal Court in Los Angeles, California, charging a violation of Section 16 (b) of the Securities and Exchange Act of 1934 and seeking damages from Hughes and Depinet as a result of the sale of their RKO stock to Screen Associates, Inc., and the subsequent return of such stock to [520] them.

12. Schiff, New York: In August, 1953, Louis Schiff and Jacob Sack instituted a suit in a state court in New York alleging the first cause of action asserted in the present Nevada action.

13. Schiff and Sack also instituted a representative action on behalf of all the stockholders of RKO on February 16, 1954, in the Chancery Court of the State of Delaware seeking to enjoin the consummation of the sale of RKO's assets to Hughes on the ground that such sale was fraudulent. RKO

promptly appeared, answered and moved for an immediate trial. This motion was granted and trial began on March 8, 1954. RKO, in the meantime, at plaintiffs' request, produced four of its personnel for examination by plaintiffs before trial. The trial concluded on March 11, 1954. Decision has been reserved.

14. Schiff and Sack on February 18, 1954, also instituted a representative action on behalf of all stockholders of RKO on February 18, 1954, in the Supreme Court of the State of New York. This action was in all material respects identical with the Delaware action described in paragraph 13.

#### C. Hughes' Offer and Corporate Action

15. On February 7, 1954, the defendant Hughes offered to purchase all of the assets of RKO Pictures Corporation for \$23,489,478.00 in cash subject to certain conditions set forth in such offer.

16. The board of directors on February 12 and 13, 1954, considered such offer and on the latter date accepted same and authorized a duly constituted officer of RKO Pictures Corporation to accept the same subject to approval of the stockholders of RKO in the manner specified in the offer.

17. I find that prior to taking any action upon the consideration or acceptance of the Hughes' offer, the board of directors of RKO was enlarged and new directors were elected, and that the quorum of

four directors who considered the offer and authorized its acceptance consisted exclusively of individuals who were not defendants in any pending stockholders' action; that they were not interested in the transaction represented by the offer; that they exercised their independent judgment in considering the merits of the proposed sale, and that they concluded on the basis of such consideration [521] that it was in the interest of the corporation to accept such offer.

18. Thereafter, the president of RKO, being a duly constituted officer of RKO, did accept such offer of Hughes, subject to approval of the stockholders of RKO in the manner specified in the offer.

19. In conformity with the bylaws of the corporation and the regulations of the Securities and Exchange Commission a proxy statement was mailed to each stockholder of RKO setting forth the terms and conditions of the offer and all other relevant information accompanied by a formal proxy to be signed by the stockholder authorizing the vote of the stockholder's share for or against the proposed sale of the assets of RKO pursuant to such offer.

20. On March 18, 1954, the stockholders of RKO met pursuant to the call of the directors at Dover, Delaware. At such meeting there were represented by proxy a total of 3,358,116 shares out of the total of 3,891,562 shares of the common stock of RKO issued outstanding and entitled to vote.

21. At such meeting of the stockholders a resolu-

tion was submitted approving the acceptance of the offer of Hughes for the purchase of all the assets. The vote upon such resolution in the affirmative was 3,284,889 shares consisting of 2,022,769 shares owned by stockholders other than Hughes and 1,262,120 shares owned by Hughes. The vote against the adoption of the resolution was 73,227 shares.

22. I find that the occurrences and procedures recited above conform to applicable law and to the provisions of Article 18 of the certificate of incorporation of RKO Pictures Corporation; and in view of my findings and conclusions herein set forth, I further conclude that when the sale transaction is consummated it will be valid to transfer title to the assets of RKO Pictures Corporation to Howard R. Hughes, as provided in the offer.

#### D. Evaluation of Corporate Assets Other Than Stockholders' Derivative Suits

23. The Hughes offer did not allocate any portion of the stated consideration, \$23,489,478.00, to any specific assets of the corporation. The board of directors of RKO Pictures Corporation, however, in considering the offer and the desirability of its acceptance reviewed at length the [522] nature of the various assets and liabilities and the available facts bearing upon their value or amount.

24. The analysis by the board of directors covered not only the assets and liabilities as stated in the current balance sheet of the corporation but also the respects in which the book values of such

assets and liabilities may not reflect their present value or amount, as well as all other potential assets or liabilities of the company not included in the balance sheet. In appraising the fairness and adequacy of the Hughes offer the directors recognized that the values of certain of the assets and liabilities were not precisely determinable, including the film library, the restricted foreign funds, and the possible contingent asset of the stockholders' actions. Without specifically allocating any portion of the stated consideration of \$23,489,478.00 to such not precisely determinable assets, the board considered the same and arrived at its decision that the offer was fair, and that it was expedient and in the best interests of the corporation to accept the same and recommend its acceptance to the stockholders. In view of my further findings with respect to the merits of the present and related litigation, I have reached the conclusion that the method employed by the directors was a proper one; and I find that after allocating the necessary part of such purchase price to those assets capable of specific evaluation, there remains a reasonable margin, which after weighing all of the factors, I find to be an ample and fair consideration for the sale of the assets not capable of precise evaluation, including the derivative stockholders' actions.

25. I conclude that the purposes of Rule 23 (c) of the Nevada Rules of Civil Procedure are met if the Court finds from a consideration of all the facts that the entire transaction is fair and reasonable

and I further conclude that the Court is not required to find specifically as to the exact portion of the purchase price allocable to a compromise of the pending derivative actions.

E. Analysis of Charges Against the Defendants  
Other Than RKO and Against Other Directors

\* \* \*

F. Approval of Compromise

37. I find and conclude that the compromise which will be effected by the defendant Hughes' purchase of the corporate assets, pursuant to his offer, is fair and adequate; that it is in the interest of the corporation and its stockholders that the compromise effected by the offer be accepted; and that it is in the interest of the stockholders and the corporation that such compromise be approved and that this action be dismissed as to all defendants with prejudice.

G. Charge That These Proceedings Are Collusive

38. It has been variously charged in ancillary proceedings had herein as well as in other actions pending elsewhere that this court's jurisdiction is a product of collusion; that this action is not truly adversary; and that the representation of the other stockholders of RKO by the plaintiffs is inadequate. These charges, however made, have been specifically denied by everyone whose activities have been impugned thereby, and I have received and considered

evidence thereon. I find from the evidence that after three highly-publicized derivative actions had been instituted in various jurisdictions, in none of which Howard R. Hughes was served or appeared, Floyd Odium (whose firm, Atlas Corporation, is a large stockholder of RKO) sought to end the injury to RKO through newspaper trial by submitting the controversy to speedy judicial determination with the chips to fall where they may. At a conference arranged by Odium, Hughes' representative stated that plaintiffs were free to pursue any policy or course they desired but if they instituted suit in Las Vegas, Nevada, where Hughes resides and is domiciled, he would appear and answer. I find that no other agreement or understanding, express or tacit, was made by the parties or their counsel. Plaintiffs thereafter instituted this action and Hughes appeared and answered. Hughes Tool Company and the individual defendants also appeared and answered. The RKO corporate defendants, indispensable parties to this action, likewise appeared and answered, believing it to be in the best interests of the stockholders, and so notifying them of that conclusion to have the controversy litigated in an action wherein Hughes was a defendant. Plaintiffs have [540] examined before trial in connection with this action more than twenty parties and witnesses whose testimony runs to more than 2,500 pages. More than 180 exhibits have been marked for identification in the course of those examinations. This action was set for trial on January 4, 1954, at which time plaintiffs' counsel were

stayed from prosecuting it by virtue of an order issued by the New York Court in connection with an appeal taken by the stockholder plaintiffs in an action pending in that Court.

39. I find as conclusions of fact and of law that this Court's jurisdiction is not a product of collusion of any type; that Howard R. Hughes resides and is domiciled in Nevada; that this action is, and has been conducted as a truly adversary proceeding; that plaintiffs have prosecuted this action diligently; that the stockholders of RKO have been fully and adequately represented by plaintiffs, and that the judgment dismissing this action with prejudice is binding upon all other stockholders of RKO.

Dated: March 30, 1954.

FRANK McNAMEE,  
District Judge.

[Endorsed]: Filed March 30, 1954, Nevada District Court. [541]

## EXHIBIT No. 4

[Attached to Affidavit of George Benedict, Jr.]

Case No. 59422

Dept. No. 1

In the Eighth Judicial District Court of the State of  
Nevada in and for the County of Clark

ELI B. CASTLEMAN and MARION V. CASTLE-  
MAN, Doing Business as WOLVERINE TEX-  
TILE COMPANY, and LOUIS FEUERMAN,

Plaintiffs,

vs.

J. MILLER WALKER, FRANCIS J. O'HARA,  
JR., HOWARD R. HUGHES, NOAH DIET-  
RICH, NED E. DEPINET, HUGHES TOOL  
COMPANY, RKO PICTURES CORPORA-  
TION and RKO RADIO PICTURES, INC.,

Defendants.

## ORDER

On the 22nd day of March, 1954, came on to be heard the motion of defendant Howard R. Hughes to dismiss this proceeding. Appearing in court were all parties to this action duly represented by counsel, and also appearing by counsel were the following stockholders, not parties to the action: Julius November, Eleanor November, and Sidney Schwartz.

Upon the pleadings and the evidence, it appearing to the Court that the defendant Hughes has offered to purchase all the assets of the defendant RKO Pictures Corporation for \$23,489,478.00; that the consummation of such sale will extinguish all claims and causes of action asserted, or which may be asserted, against Hughes by or on behalf of such corporation or any of its wholly-owned subsidiaries; that the consummation of such sale will vest in him all claims and causes of action against all other defendants and directors; that he has stated he will not prosecute [543] and will not permit to be prosecuted the causes of action, if any, with respect to defendants Hughes Tool Company, Depinet, Dietrich, O'Hara, and Walker, or with respect to the other directors; that the offer when consummated will result in a compromise of this and all other derivative and representative actions and will render them moot.

It further appearing that pursuant to the order of this Court dated February 11, 1954, as amended February 16, 1954, due and timely notice of the hearing upon such motion to dismiss this action with prejudice was given to all stockholders of RKO Pictures Corporation by mailing to each such stockholder, with the proxy statement dated February 28, 1954, a copy of such notice in the form directed by this Court; and that no stockholder or party has appeared to oppose the dismissal; and it further appearing on the basis of the Findings of Fact and Conclusions of Law filed herewith that such offer

is fair and reasonable and that the sale of all the assets of RKO Pictures Corporation to Howard R. Hughes in accordance therewith should be approved as a compromise and settlement of this action,

It is accordingly Ordered, that the sale of all of the assets of RKO Pictures Corporation to the defendant Howard R. Hughes is hereby approved by the Court pursuant to the provisions of Rule 23 (c) of the Nevada Rules of Civil Procedure. This Order is interlocutory only; and at any time within ten days from the date of this Order a Final Order dismissing the cause of action with prejudice may be entered by any party without notice to any other parties upon an affidavit showing that the purchase agreement has been consummated, such Final Order to provide, however, that this Court shall retain jurisdiction of this cause for the sole purpose of hearing and determining plaintiffs' cross-motion for award of costs and fees and the motion of defendant RKO Pictures Corporation to settle all costs and fees, unless theretofore determined by stipulation.

Entered this 30th day of March, 1954.

FRANK McNAMEE,  
District Judge.

[Endorsed]: Filed March 30, 1954, Nevada District Court [544]

EXHIBIT No. 5

[Attached to Affidavit of George Benedict, Jr.]

Case No. 59422

Dept. No. 1

In the Eighth Judicial District Court of the State of  
Nevada in and for the County of Clark

ELI B. CASTLEMAN and MARION V. CASTLE-  
MAN, Doing Business as WOLVERINE TEX-  
TILE COMPANY, and LOUIS FEUERMAN,

Plaintiffs,

vs.

J. MILLER WALKER, FRANCIS J. O'HARA,  
JR., HOWARD R. HUGHES, NOAH DIET-  
RICH, NED E. DEPINET, HUGHES TOOL  
COMPANY, RKO PICTURES CORPORA-  
TION and RKO RADIO PICTURES, INC.,

Defendants.

MOTION FOR FINAL JUDGMENT

The defendant RKO Pictures Corporation (herein called "RKO") on the attached affidavit of Roy W. McDonald, respectfully shows the Court that the purchase agreement between Howard R. Hughes (herein called "Hughes") and RKO heretofore established by the offer of Hughes dated February 7, 1954, the acceptance by RKO pursuant to authority of its Board of Directors dated February 13, 1954, communicated by RKO through its president on February 15, 1954, and approved by RKO's

stockholders on March 18, 1954, was duly and finally consummated on March 31, 1954.

The defendant RKO respectfully moves that this Court enter its Final Judgment dismissing this cause with prejudice, pursuant to the terms of the Interlocutory Order entered herein on March 30, 1954, such Final Judgment to retain jurisdiction of this [546] cause solely for the purpose of hearing and determining the motion of RKO to determine and settle all costs, if any, and fees, if any, to which the plaintiff or plaintiffs in any derivative or representative action purportedly brought on behalf of RKO or its stockholders, wherever instituted or pending, may be entitled, and the cross-motion of plaintiffs herein for award of costs and fees.

Dated this 1st day of April, 1954.

HAM & HAM,

Las Vegas, Nevada;

DONOVAN, LEISURE,

NEWTON & IRVINE,

2 Wall Street,

New York 5, New York;

/s/ ROY W. McDONALD,

2 Wall Street, New York 5, New York; Attorneys  
for RKO Pictures Corporation.

[Endorsed]: Filed April 1, 1954, Nevada District Court [547]

EXHIBIT No. 6

[Attached to Affidavit of George Benedict, Jr.]

Case No. 59422

Dept. No. 1

In the Eighth Judicial District Court of the State of  
Nevada in and for the County of Clark

ELI B. CASTLEMAN and MARION V. CASTLE-  
MAN, Doing Business as WOLVERINE TEX-  
TILE COMPANY, and LOUIS FEUERMAN,

Plaintiffs,

vs.

J. MILLER WALKER, FRANCIS J. O'HARA,  
JR., HOWARD R. HUGHES, NOAH DIET-  
RICH, NED E. DEPINET, HUGHES TOOL  
COMPANY, RKO PICTURES CORPORA-  
TION and RKO RADIO PICTURES, INC.,

Defendants.

FINAL JUDGMENT OF DISMISSAL

On this 1st day of April, 1954, came on to be  
heard the motion of RKO Pictures Corporation  
(herein called "RKO") for the entry of a Final  
Order pursuant to the provisions of the Inter-  
locutory Order heretofore entered in this cause upon  
the 30th day of March, 1954;

And it appearing from the affidavit of Roy W.  
McDonald, filed herein on this date, that on the  
31st day of March, 1954, in the City of Wilmington,  
State of Delaware, the defendant Howard R.

Hughes (herein called "Hughes") paid to RKO \$23,489,478.00 and that on such date and at such place RKO transferred and assigned to Hughes all the assets of RKO; and that thereby the purchase agreement between Hughes and RKO referred to in the Interlocutory Order of March 30, 1954, has been fully and finally [552] consummated;

It is accordingly Ordered, Adjudged and Decreed, that the above styled and numbered cause be and the same hereby is finally dismissed with prejudice as to all defendants;

And it appearing to the Court that the dismissal herein adjudged finally determines all matters and issues as between the plaintiffs and the defendants upon the merits of this litigation, and that there is no just reason for delay in entry of such final Judgment, it is directed that this judgment be forthwith entered as final.

Jurisdiction of this action is retained by the Court for the sole purpose of hearing and determining the motion of RKO to determine and allocate all costs and fees, if any, allowable to the plaintiffs in any stockholder's representative or derivative action, wherever pending; and to hear and determine the plaintiffs' cross-motion for an award of costs and fees.

Entered, this 1st day of April, 1954.

FRANK McNAMEE,

Judge.

[Endorsed]: Filed April 1, 1954, Nevada District Court. [553]

EXHIBIT No. 7

[Attached to Affidavit of George Benedict, Jr.]

Case No. 59422

Dept. No. 1

In the Eighth Judicial District Court of the State of  
Nevada in and for the County of Clark

ELI B. CASTLEMAN and MARION V. CASTLE-  
MAN, Doing Business as WOLVERINE TEX-  
TILE COMPANY, and LOUIS FEUERMAN,

Plaintiffs,

against

J. MILLER WALKER, FRANCIS J. O'HARA,  
JR., HOWARD R. HUGHES, NOAH DIET-  
RICH, NED E. DEPINET, HUGHES TOOL  
COMPANY, RKO PICTURES CORPORA-  
TION and RKO RADIO PICTURES, INC.,

Defendants.

FINAL ORDER

On this 5th day of April, 1954, came on to be  
heard, pursuant to the reservation of jurisdiction in  
the Final Judgment in this action entered April 1,  
1954, the following:

1. The Motion of RKO Pictures Corporation  
and RKO Radio Pictures, Inc., filed March 19,  
1954, praying for an order determining what por-  
tion, if any, of the sum paid by defendant Howard

## Exhibit No. 7—(Continued)

R. Hughes to defendant RKO Pictures Corporation for all the assets of such corporation shall be allocated for payment of all costs and disbursements, if any, including all counsel fees, if any, and all other lawful expenses, if any, of all plaintiffs in all stockholders' actions, derivative and/or representative, wherever now [555] pending; and determining the apportionment of such sum, if any, among all such plaintiffs to the extent any such plaintiffs shall show themselves entitled to participate in such fund; and directing that RKO Pictures Corporation and RKO Radio Pictures, Inc., upon proof of payment of the respective interests, if any, as determined by this Court on such motion, either to the party or into the registry of this Court for the account of such party, be released and discharged from any and all liability to each of the plaintiffs in each of the various stockholders actions, wherever they are now pending, in connection with said plaintiffs' costs, if any, and disbursements, if any, in said actions; and

2. The Cross-Motion of plaintiffs Eli B. Castleman, et al., dated March 2, 1954, for an order assessing upon RKO Pictures Corporation and RKO Radio Pictures, Inc., the reasonable expenses of the plaintiffs, including their attorneys' fees and accountants' fees, in such amount as the Court shall determine to be reasonable, arising out of and incurred in the prosecution of the claims and causes

Exhibit No. 7—(Continued)

of action of RKO Pictures Corporation and RKO Radio Pictures, Inc., by said plaintiffs; and

3. The Motion, filed April 2, 1954, of Vaughan & Brandlin, attorneys at law of Los Angeles, California, on behalf of Harry Rosenthal and Gertrude Rosenthal, for an allocation to such movants of a sum as costs, disbursements, counsel fees, and other lawful expenses; and

4. The informal application by letter of Mortimer A. Shapiro of Nemerov & Shapiro, attorneys at law of New York, N. Y., for an adjournment for an unstated period of a determination with respect to the rights, if any, of Nemerov & Shapiro in this matter.

The Court thereupon heard the evidence, including the exhibits offered; incorporated as a part of the record on this [556] hearing, all prior proceedings in this action, including but not limited to proceedings, evidence, and exhibits at the hearing beginning March 22, 1954, upon the motion of the defendant Howard R. Hughes for dismissal of this action with prejudice and the Findings of Fact, Conclusions of Law, Order, and Final Judgment entered after such hearing; heard the argument of counsel; and having considered the same, renders this as its final order on such motions and application.

The Court finds and concludes from such record:

1. That on March 20, 1954, the Honorable A. S. Henderson, a Judge of this Court, signed an Order

## Exhibit No. 7—(Continued)

of this Court setting the above-described motion of RKO Pictures Corporation and RKO Radio Pictures, Inc., for hearing by this Court at Las Vegas, Nevada, on the 5th day of April, 1954, at 9:30 a.m. and ordering that service of a copy of such Order, together with a copy of the Motion on behalf of such corporations, and the affidavit in support thereof, on the plaintiffs and their attorneys in each of the pending stockholders' actions, derivative and/or representative, wherever pending, made by registered mail, return receipt requested, directed to the attorneys who have appeared on behalf of such plaintiffs on or before March 22, 1954, should be sufficient notice to said plaintiffs and their attorneys of the pendency of said Motion.

2. That on March 22, 1954, at the hearing on the Motion to Dismiss this action with prejudice, certain stockholders appeared in person or by counsel and participated, or were accorded full opportunity to participate, in this proceeding; that among such stockholders so appearing were Sidney Schwartz, appearing by Israel Beckhardt, Esq., and Louis Fieland, Esq., attorneys of New York, N. Y., who were admitted for the purpose of participating in such hearing; and Julius November and Eleanor November, appearing by Foley & Foley, [557] attorneys of Las Vegas, Nevada.

3. That the fund from which allowances, if any, to stockholders who are plaintiffs in derivative or representative stockholders actions, wherever pend-

## Exhibit No. 7—(Continued)

ing, for their reasonable expenses, if any, including attorneys' fees, if any, to which they might prove themselves entitled, results solely from the offer of the defendant Hughes to purchase all of the assets of RKO Pictures Corporation; that no other Court has jurisdiction over the defendant Hughes in any of the stockholders' actions now pending; that insofar as such offer includes the claims asserted in stockholders' actions, and hence has the aspects of a settlement thereof, it is subject solely and exclusively to the jurisdiction of this Court; that such fund is subject only to such orders as this Court may make herein after due and lawful notice.

4. That on March 22, 1954, service of notice of the motion of RKO Pictures Corporation and RKO Radio Pictures, Inc., in the form and manner prescribed by the Order of this Court dated March 20, 1954, was duly and legally made by mailing by registered mail to each of the attorneys listed in Exhibit B to the affidavit of A. W. Ham, Jr., Esq., dated March 17, 1954, filed in support of such Motion of RKO Pictures Corporation and RKO Radio Pictures, Inc., a copy of such Order of this Court dated March 20, 1954, a copy of such Motion, and a copy of the affidavit in support thereof, with its exhibits.

5. That due proof of such service has been made before this Court.

6. That each of the plaintiffs and their counsel so duly served with notice of this hearing and each

## Exhibit No. 7—(Continued)

of the attorneys so duly served, with the exception of those hereinafter specifically named and disposed of, have failed to appear and make any showing that [558] they are entitled to claim or recover any sum of money as reimbursement for expenses, including attorneys' fees, out of the fund received by RKO Pictures Corporation from the sale of its assets to Howard R. Hughes; but on the contrary, each of such plaintiffs and each of such counsel, except those hereinafter specifically named and disposed of, have defaulted on this Motion.

7. That the plaintiffs Eli B. Castleman, et al., on their motion, have established that they are entitled to recover from such fund their reasonable expenses; that a reasonable allowance to them for such expenses is as follows:

For attorneys' fees, \$125,000.00;

For accountants' fees, \$25,000.00;

For disbursements for expenses of their attorneys, \$8,000.00;

For disbursements for expenses of their accountants, \$2,000.00;

that such allowance shall cover all fees for all attorneys who have appeared in any action, wherever pending, on behalf of Eli B. Castleman, et al., the plaintiffs in this action, and all accountants or others who have rendered any services on their behalf, whether or not such attorneys or accountants have appeared in this Court.

Exhibit No. 7—(Continued)

8. That the stockholders Harry Rosenthal and Gertrude Rosenthal, and their attorneys Vaughan & Brandlin, did not confer any benefit upon RKO Pictures Corporation or RKO Radio Pictures, Inc., or contribute to any benefit to such corporations, by their activities; that they sought to intervene in an action by Eli B. Castleman, et al., pending in the District Court of the United States for the Southern District of California at Los Angeles, California; that said application for leave to intervene has not been granted; and that such stockholders and their counsel are not entitled to recover [559] any sum from either RKO Pictures Corporation or RKO Radio Pictures, Inc., by reason of such activities.

9. That no good cause has been shown for deferring a ruling upon the rights of Nemerov & Shapiro, Esqs., in this action.

10. That there has been no showing by any stockholder (other than plaintiffs herein) or any attorneys (other than attorneys for plaintiffs herein), that any such stockholder or attorney has conferred any benefit on RKO Pictures Corporation or RKO Radio Pictures, Inc., or contributed in any degree to any such benefit, by reason of the various stockholders' derivative and representative actions elsewhere instituted; that the evidence tends overwhelmingly to show that such of the other actions as were instituted after this action created needless expense to such corporations by the prosecu-

## Exhibit No. 7—(Continued)

tion of actions which duplicated the causes of action here asserted, or else were actions without factual or legal merit, in jurisdictions where the plaintiffs were unable to secure jurisdiction over the defendant Hughes; that the evidence also tends overwhelmingly to show that the only action instituted prior to this action (except the actions in New York and California instituted by Eli B. Castleman, et al.) is the action by Sidney Schwartz in New York, in which the individual defendant Hughes was not served and in which there has been no joinder of issue; and there has been no showing that any stockholder, attorney, or other person is entitled to recover any amount from the sum now within the jurisdiction of this Court.

It is, accordingly, Ordered, Adjudged and Decreed:

1. That the Motion of RKO Pictures Corporation and RKO Radio Pictures, Inc., be and the same is hereby granted, and the Court hereby allocates the sum of One Hundred and Sixty Thousand (\$160,000.00) Dollars for the payment of costs and disbursements [560] in all the stockholders' actions, wherever now pending, purporting to be brought on behalf of the stockholders, or any of them, of defendant RKO Pictures Corporation, or on behalf of said defendant, against Howard R. Hughes and other individual defendants and Hughes Tool Co.; and the Court hereby determines and fixes the interests in such fund as hereinafter provided.

Exhibit No. 7—(Continued)

2. That the cross-motion of the plaintiffs Eli B. Castleman, et al., for allowance of their reasonable expenses is granted; and judgment is here rendered that Eli B. Castleman and Marion V. Castleman, doing business as Wolverine Textile Company, and Louis Feuerman have and recover of and from RKO Pictures Corporation and RKO Radio Pictures, Inc., jointly and severally, the sum of One Hundred and Sixty Thousand (\$160,000.00) Dollars as reimbursement of such plaintiffs for all expenses for attorneys and accountants and other disbursements incident to the prosecution of this and all other actions in which Eli B. Castleman, et al., or any of them, are plaintiffs as stockholders of RKO Pictures Corporation.

3. That the motion on behalf of Harry Rosenthal and Gertrude Rosenthal, and their attorneys Vaughan & Brandlin, for an allowance for costs, disbursements, and expenses, be and the same is hereby denied.

4. That the informal application of Mortimer A. Shapiro, and the firm of Nemerov & Shapiro, that the action of this Court with respect to the rights, if any, of such firm in this matter be and the same is hereby denied.

5. That RKO Pictures Corporation and RKO Radio Pictures, Inc., be, and they hereby are, released and discharged from any and all claims by any plaintiff or other stockholder of RKO Pictures

## Exhibit No. 7—(Continued)

Corporation (other than the plaintiffs herein as hereinabove [561] adjudged and decreed) in any action purported to be brought on behalf of RKO Pictures Corporation or RKO Radio Pictures, Inc., or both, wherever instituted or pending, for attorneys' fees, accountants' fees, or other expenses, asserted to have been incurred in any such action or actions.

Entered this 5th day of April, 1954.

FRANK McNAMEE,  
Judge.

[Endorsed]: Filed April 15, 1954, Nevada District Court. [562]

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[Title of District Court and Cause.]

AFFIDAVIT OF BERNARD REICH IN  
OPPOSITION TO MOTION TO DISMISS

State of California,  
County of Los Angeles—ss.

Bernard Reich being first duly sworn, deposes and says:

1. I am the attorney for the plaintiffs and the proposed interveners in the above matter, and make this affidavit in opposition to the motion to dismiss.

2. The grounds of my opposition are as follows:

(a) The Nevada proceedings are not res judicata

and do not bar the further prosecution of this lawsuit;

(b) Before there can be a dismissal plaintiffs and the proposed interveners are entitled to a separate trial of the issues raised with respect to the Nevada action, that is, whether the action was collusive, or at [636] least whether it was truly adversary.

(c) Before there can be a separate trial as aforesaid plaintiffs and proposed interveners are entitled to discovery, including the taking of the deposition of Mr. Hughes and the appointment of a Special Master, all as previously and timely moved.

3. First with respect to the ground of opposition that the Nevada proceedings are not *res judicata*:

(a) The moving papers on their face show that the only motion leading to the final judgment of which the stockholders had notice was a motion to dismiss not on the merits but on the ground of mootness, in that Mr. Hughes was about to purchase the assets of RKO, including the actions against him. They show that the action in Nevada was not in fact or in law dismissed on the ground of which the stockholders had notice, but that the Nevada court at the instance of the defendants converted the motion so as to approve the sale of the assets as a "compromise" of the lawsuits and dismissed on the merits; that the stockholders were not given notice of the "compromise" in accordance with Nevada

Rule 23(c) which corresponds to Rule 23(c) of the Federal Rules of Civil Procedure. Without analyzing the proceedings in Nevada, the sense of it is that the defendants first contended that Mr. Hughes' offer was an offer to "purchase" which rendered the stockholder suits moot. Once, however, they obtained in Delaware an adjudication against vacating the sale, the defendants sought to obtain the benefits of Rule 23(c). The stockholders never had any notice that the Nevada court would hear evidence [637] on whether or not the offer of Mr. Hughes was a fair "compromise" of the lawsuits against Mr. Hughes. In this connection and in this California action Mr. Hughes' counsel, Mr. Raymond Cook of Texas, denied that his client's offer was in effect a compromise of the various suits. In order, however, to give to the Nevada decree respectability and lay foundation for the instant motion to dismiss, defendants introduced in Nevada, without prior notice to the stockholders or to the proposed interveners, the issue of "compromise" under Rule 23(c).

(b) Prior to the hearings which led to the Nevada judgment the proposed interveners here, the Novembers, had sought to intervene in the Nevada action and were refused. They appealed.

In view of the refusal, the judgment in Nevada can be no more *res judicata* as to the Novembers than to any other stockholder who did not appear in the Nevada action.

Having been refused intervention in the Nevada action the Novembers' intervention in this action may not be opposed by reference to the Nevada judgment.

(c) Any finding by the Nevada court that it finds no collusion or the lack of a fair adversary proceeding begs the question and is not binding on this Court. The principle of *res judicata* is of course subject to the challenge made in this Court that the judgment in Nevada was obtained by collusion, or that there was not in Nevada a truly adversary proceeding.

4. With respect to the issue of collusion and/or whether or not there was a truly adversary proceeding in Nevada: [638]

(a) I incorporate by reference all of my affidavits previously filed in this action;

(b) I affirm under oath herewith the oral statements which I made to the Court in each and every hearing had in this action;

(c) I renew each and every one of my motions, including the motion (1) for the appointment of a Special Master, (2) to set aside on the grounds of fraud that part of the order of January 12, 1954, which did not vacate the quashing of the service on Mr. Hughes, and (3) for leave to take the deposition of Mr. Hughes;

(d) I respectfully call the Court's attention to this Court's rulings and statements on a hearing

on December 14, 1953, referring to the first part of the hearing, as follows:

(Page 3, Lines 18 to 25):

“The Court: Mr. Reich, I have studied the affidavits and have given the matter considerable thought and have come to a more or less of a conclusion in the matter and that is that I am going to take the matter off calendar and hold it in abeyance until there has been a trial in Nevada.

“I am not going to take any steps or do anything that would interfere with that court’s trial of the action. I don’t want to embarrass that court.”

(Page 7, Line 17, to Page 8, Line 1);

“And I have heard so much about this case and there has been so much smoke raised is one reason why I have come to the conclusion that I have. There is one matter pending in New York on appeal. It is the same kind of [639] an investigation. And there is an action pending over there in Nevada that I understand is set for trial in the first part of January. Because of that I am not going to take any steps until that case is disposed of.

“I have read some of the cases where they have authorized and approved such proceedings after judgment.”

(Page 9, Lines 4 to 7):

“The Court: I will give you an opportunity to reply and I am not questioning your sincerity of purpose at all, but in my judgment this matter

should not be heard until after the case in Nevada has been disposed of.”

Now referring to the second part of the hearing in a separate transcript:

(Page 5, Line 23, to Page 6, Line 8):

“The Court: Counsel, I have been trying to tell you that I am willing to take the responsibility in the exercise of my discretion to continue this motion until after that case is disposed of. After that case is disposed of if you claim it is collusive—a collusive judgment, why, then, I think I would give more serious consideration to your application at that time.

“Mr. Reich: Very well, your Honor, I accept that ruling.

“The Court: I am not quarreling with you, counsel. I am just quarreling with the timing. I disagree with you on the timing.” [640]

(Page 7, Lines 4 to 8):

“The Court: I am not going to appoint a master at this time.

“To appoint a master at this time in effect questions the integrity of that court and those proceedings and I am not going to do it at this time.”

(Page 26, Lines 6 to 9):

“The Court: I want it. And then it seems to me your next move if you claim there is collusion

here, is to claim there is extrinsic fraud in granting the order and attacking the order.”

(Page 27, Lines 5 to 19):

“The Court: I am going to take the motion off calendar until after the Nevada case is disposed of.

“I am not claiming there is not merit in your argument. There may be. It may be a matter for the FBI to investigate. There may be such a fraud here as you have indicated that will require a broader investigation than a master can possibly make. I don’t know. And I am not passing upon it. I am not passing upon the merits, but I am just saying that I owe that courtesy to the Nevada court where they have this case set for trial and not to take any steps that would look like a reflection upon that court at this time.

“Now, as I understand your position you do not claim that any fraud was perpetrated by the court itself but you are claiming that counsel by collusion has committed fraud. That is the sum and substance of your argument.” [641]

(e) This Court has therefore taken the consistent position of waiting and seeing what happens in Nevada, and passing on no motions designed to obtain the evidence in support of the charges made in this action. This Court has stated that it was questioning my timing and that it would be time enough after the termination of the Nevada proceedings to go into the issues of collusion, conspiracy

and fraud. The time apparently is now and I and the proposed interveners so move.

5. If I am permitted to take the deposition of Mr. Hughes, and if a Special Master is appointed, I offer to prove the following:

(a) At the time this action was filed Mr. Hughes was a resident of the State of California.

(b) Mr. Hughes removed his residence to Las Vegas, Nevada, as part and parcel of a scheme and plan to deprive this Court of jurisdiction and to confer jurisdiction on the State of Nevada.

(c) As part of this scheme and plan the RKO defendants and the individual defendants, who were not residents of Nevada, nevertheless submitted to that jurisdiction.

(d) At the time when the defendants submitted to the jurisdiction of Nevada there was and there is no security law such as is applicable in the State of California, and which is most favorable to defendants in a minority stockholder action.

(e) The plan and scheme to transfer jurisdiction to the Nevada court included the dropping of an application in New York for the appointment of a receiver where it was misrepresented that there was no [642] consideration for the withdrawal. It is true, however, that I have no evidence of any monetary consideration; but it is equally true that there was "legal" consideration, in that the agreement was to try all issues in the Nevada court

where, however, there was to be no truly adversary proceeding and where in fact the proceedings were not truly adversary.

(f) As part of the plan and scheme defendants took some 18 depositions, 17 of which ran only to some 1,100 or 1,300 pages. These depositions were not truly adversary and were so much “window dressing.”

(g) As part of the plan and scheme the New York action was dropped and the Nevada action was begun, both without the knowledge or consent of your deponent.

(h) As part of the plan and scheme this action was dismissed without the knowledge or consent of your deponent.

(i) As part of the plan and scheme the New York attorneys for the plaintiffs opposed in this action the vacation of the order of dismissal which this Court stated was unfairly presented to it.

(j) As part of the plan and scheme the New York attorneys for the plaintiffs sought to depose your deponent, prevent him from fulfilling his obligations to the stockholders and to this Court, and tried to obtain control of this action in order to “kill it.”

(k) As part of the plan and scheme the defendants [643] and plaintiffs’ New York counsel attempted to lure your deponent into Las Vegas so as to lay the ground work for a claim of *res judicata*, and when this failed, the New York attorneys

for the plaintiffs, by false affidavits, sought to compromise and prejudice your deponent before this Court and the Nevada court.

(1) On a self-serving motion by and on evidence of the defendants alone, and again without a truly adversary proceeding, the Las Vegas court found that there was no collusion in the Nevada action.

(m) The Nevada court permitted no intervention, except with respect to one intervener and in this instance the court imposed impossible terms which caused the intervener to withdraw.

(n) Mr. Hughes never testified in person before the Nevada court. In fact the Nevada court founded its judgment primarily on the "suspect" depositions.

(o) As part of the plan and scheme the defendants and plaintiffs' New York counsel attempted to lure your deponent to Nevada on the issue of counsel fees. Failing in this, the defendants paid the fees not to plaintiffs' New York counsel but to the plaintiffs, knowing full well that there was a dispute between us and that the plaintiffs had no intention of meeting their obligations to me.

6. This action was commenced against, among others, RKO Pictures Corporation, the parent company, and RKO Radio Pictures, Inc., the local operating company. The parent company refused to accept service in this jurisdiction on the ground that it was not doing business here. The same company, however, [644] submitted to the juris-

diction in Nevada. Notwithstanding I know from my experience with the parent company in at least a half dozen anti-trust actions, and from other information, that the parent company does do business in this state sufficient to be amenable to process, I did not press the point for three reasons: (a) There were and are other and more important issues, (b) it was Mr. Hughes' control of the local operating company which was all-important, and (c) this Court and the defendants had urged me not to upset the status quo until the Nevada action was terminated.

To any argument that the parent company is a proper party defendant I say that this defendant has been joined in the action and that no motion to dismiss lies on the ground that a co-defendant has been named but not served. If however this be important to the motion to dismiss I respectfully request a continuance of the motion in order for me to effect service on the parent company.

7. The Nevada court found that it was the only court having jurisdiction over Mr. Hughes. Such finding obviously is not binding on this Court. There has been no final determination here that Mr. Hughes is not subject to the jurisdiction of this Court. He was served with process. He made a motion to quash service. Plaintiffs, for the reasons already given to this Court by affidavit, defaulted. I have moved to set aside this default on the ground of mistake and fraud. I have charged that Mr. Hughes' removal to Las Vegas, Nevada, and the

default of the plaintiffs were part and parcel of the plan and scheme to deprive this Court of jurisdiction of Mr. Hughes and of this lawsuit. I have repeatedly requested the benefits of the discovery procedures, including the deposition of Mr. Hughes and the appointment of a special master, not [645] only on the issue of collusion but on the issue of Mr. Hughes' residence and the circumstances surrounding plaintiffs' default on the motion to quash.

So far as I know there has been no final or contested order regarding the issue of this Court's jurisdiction of Mr. Hughes. Even if there is, and even if such an order is appealable, the motion to dismiss cannot be predicated on that ground, since I have the right to effect service on Mr. Hughes. The fact is that Mr. Hughes does come into this state in the dead of night and with strong safeguards; but if it be vital to this proceeding, I would undertake to effect service on him, and for that purpose I would respectfully request a continuance of the motion to dismiss.

8. With respect to certain allegations set forth in the affidavit of Roy W. McDonald in support of motion to dismiss with prejudice, and using his paragraph numbers, I would state the following:

"3." It is true that the complaint in the Nevada action and the amended complaint subsequently filed herein embraced the identical causes of action set forth in this action. The essential facts however are as follows: The complaint in the California

action was filed first. In the main it followed the complaint filed in New York by Mr. Kipnis. Thereafter the California complaint was substantially revised by me. At the time the Novembers sought to intervene in Nevada, Mr. Kipnis' complaint in that court was almost identical with the complaint which I first filed here in California. Just minutes before the court in Nevada denied the November intervention, Messrs. Kipnis and Mittelman filed an amended complaint, so that the court then held [646] that the Novembers' proposed complaint in intervention (which was based on my complaint here in California) was identical, or, at least, raised the very same issues as did Mr. Kipnis' amended complaint just previously filed in Nevada.

"4." I accept Mr. McDonald's word that some 21 witnesses were examined orally by plaintiffs in the Nevada action. Of these at least 18 were by deposition. I know too that Messrs. Kipnis and Mittelman have represented to this Court that 17 of these depositions took a total of some 1,100 or 1,300 pages. Again I will not analyze in detail the proceedings in Nevada, but I think it appropriate to state here what the court in Nevada found as it related to these witnesses. In the first place the findings made March 30, 1954, page 24, refer to "20 parties and witnesses whose testimony runs to more than 2,500 (?) pages." This Court may remember that in 1953 I called its attention to the admission by Mr. Kipnis that the 17 depositions taken to that date consisted of only 1,100 or 1,300

pages. Apparently 3 or 4 more depositions or witnesses doubled the amount of pages. In any event I am prepared to prove that these depositions for the most part were a "whitewash" of Mr. Hughes. If nowhere else it is borne out by the Findings made in Nevada. On page 7 of those Findings the court states "that the charges hereafter stated in subparagraphs of this Finding have been made in various of the stockholders' actions, including this action, and have in each case been put in issue by denials by those defendants charged who were before the court in the particular action involved; further [647] that the depositions, affidavits, exhibits and testimony in evidence at this hearing do not tend to support them but on the contrary tend to negative them." (Underlining mine.)

"5." I am willing again to take the word of Mr. McDonald with reference to Mr. Hughes' offer to "purchase" all of the assets of RKO, but again I point to the fact that this on its face was not an offer to "compromise" on the part of Mr. Hughes but an offer to "purchase" the assets.

"6." I do not doubt that the motion to dismiss in Nevada was made and the notices served as Mr. McDonald states. I refer the Court respectfully, however, to the exhibits mentioned by Mr. McDonald with my observation that nowhere in the moving papers or in the notices were the stockholders or parties given notice that the court was going to consider evidence on whether or not Mr. Hughes' offer to purchase was to be considered an

offer to compromise, or that it would take evidence on the fairness of Mr. Hughes' offer as a "compromise" of all of the stockholder actions against him. In this connection I refer briefly to the Nevada court's Findings wherein in paragraph 1 the nature of the motion is given as one to dismiss on the ground of mootness and the fact that consummation of the "sale" would vest in Mr. Hughes all of the claims against him. The Nevada court then states in paragraph 3 that pursuant to Rule 23(c) of the Nevada Rules of Civil Procedure it has examined into the fairness of the offer since the offer "would result in a compromise and termination of this and all other derivative and representative actions." [648] The court, in paragraph 23 of its Findings, states that Mr. Hughes did not allocate any part of the stated consideration of some twenty-three and a half million dollars to any specific assets of the corporation. In paragraph 24 the court states, however, that the board of directors did analyze the possible contingent asset of the stockholders' actions, but that it did not allocate any portion to any asset and the court goes on to say that the method employed by the directors was a proper one, and that it is not necessary for it to allocate the value of the derivative stockholders' actions. The court goes on to find no liability on the part of Mr. Hughes or the other defendants; nevertheless in a separate order it awards counsel fees and costs in a total sum of \$160,000.

On the other hand the Delaware court in its

decision dated March 26, 1954, stated that "the board of directors apparently considered, on the basis of a recommendation of RKO's general counsel (and I take that to be Mr. McDonald or his law firm), that \$2,000,000 would not be an unreasonable value to place on these (stockholders') waste actions against Hughes and other directors." So far as I know the stockholders, and particularly the Novembers, did not know that on the simple motion to dismiss on the ground of mootness, that (a) Mr. Hughes or his attorneys wanted Mr. Hughes' offer to purchase to be considered or to be "viewed" as an offer of compromise, (b) they were expected to adduce proof as to the fairness of the compromise, or (c) the board of directors had allocated \$2,000,000 as a compromise of the several actions. With respect [649] to the last point, even the Nevada court apparently did not know what allocation had been made for the lawsuits.

"7." In this paragraph of his affidavit Mr. McDonald refers to the hearing on March 22, 1954, and states that "among the stockholders present in person or by counsel were Julius and Eleanor November" and that their Nevada counsel was invited to participate and to interrogate any witnesses.

The Court's attention is respectfully referred to the order of the Nevada court dated March 30, 1954, being Exhibit 4 to the Affidavit of George Benedict, Jr., sworn to May 24, 1954, in which, and referring to the hearing on March 22, 1954, the Nevada court states on page 2 that notice of the

hearing of the motion to dismiss was given to all "stockholders," and that "no stockholder or party has appeared to oppose the dismissal."

The actual facts concerning the "presence" of the Novembers' Nevada counsel at the hearing on March 22nd are as follows: Since the Novembers had been refused intervention, the defendants (as the Nevada court's order indicates) did not deem it necessary to serve the Novembers' counsel with the notice of motion to dismiss the Nevada action. However, as the Nevada court's order indicates, they did receive the notice of hearing and the papers in support of the motion to dismiss as "stockholders." Their Nevada counsel was not invited to appear at all. According to a conversation I had with Mr. Tom Foley, the Novembers' Las Vegas counsel, he was present as an observer in the courtroom on [650] what he supposed to be a motion to dismiss on the ground of mootness. He did not put in any legal appearance, nor do the exhibits which have been made a part of this record by the defendants state to the contrary. It is true that he was invited to cross-examine, of which privilege he informed me he did not avail himself. Not having received any formal notice of the motion to dismiss, and certainly no notice that the hearing would essentially be on the issue of whether the offer of Mr. Hughes' was a fair "compromise" or not, or that the court was entertaining any motion to approve a compromise pursuant to the provisions of Rule 23(c), neither he nor his clients therefore were

in a position to adduce their own evidence on the issue actually being tried and which we find forms the bulk of the Nevada court's Findings.

I submit that Mr. Foley's presence and the offer made to him of the privilege of cross-examination is not sufficient to bind the Novembers under the principle of *res-judicata*. Assuming, however, contrary to the facts, that Mr. Foley was served with the motion papers to dismiss on the ground of mootness and that he made a legal appearance on March 22, 1954, there was still no compliance with Rule 23(c) which provides that in a class action notice of the proposed "dismissal or compromise" shall be given to all members of the class. The only notice that the members of the class had was that on a certain date there would be a motion to dismiss on the ground of mootness.

"11." Again I have no reason to doubt Mr. McDonald's statements in this paragraph, including the [651] fact that the Nevada court reserved jurisdiction for the sole purpose of determining and allocating costs and fees to all attorneys in all actions wherever pending. The fact is that I received a notice of motion inviting me to come to Las Vegas and make application for fees. I did not do so because the Nevada court had no jurisdiction over me or over the services that I rendered, and I wanted my fees and costs fixed by this Court. I considered the motion in Nevada as another chain in the acts of collusion to deprive this Court of jurisdiction and to transfer jurisdiction to Nevada.

I felt that the Nevada court had permitted itself to be used to lure me into Nevada so as to give some respectability to the defendants' (and plaintiffs' New York counsel's) claim of *res judicata*.

"12." Again I do not question the facts as alleged by Mr. McDonald in this paragraph, but I say again that Schiff and Sack were attacking a sale and not a compromise, and that the judgment in Delaware on its face is not *res judicata* of the issues before this Court. In fact the motion to dismiss is not based on the Delaware decree. Incidentally Mr. Hughes did not testify in that action personally or as far as I can see even by deposition.

"14." This paragraph alludes to the question of counsel fees and costs. Again it is true that I received notice of a motion by the defendants to hold a hearing on this issue. I have given my reasons for not appearing. I would add here the further reason that I would not waive my allegations of collusion by making an appearance in Nevada in support of a claim for counsel [652] fees. I do not want counsel fees for anything that occurred in Nevada. Moreover, the court in Nevada did not award me counsel fees for the simple reason that the Castlemans did not apply for counsel fees for me. On March 8, 1954, Mr. Kipnis wrote me in part as follows:

"Please be advised that there has been circulated by RKO Pictures Corporation a proxy statement, a notice of special meeting of stockholders, a letter

from the president, all dated February 28, 1954, and a notice of court hearing.

“In connection with the notice of court hearing, we have served a cross-motion, in substance, for an order to reimburse my clients for counsel and accountants’ fees and expenses.

“Reimbursement for said counsel and accountants’ fees encompasses wholly and solely the services rendered by Mr. Mittelman and myself and others here in New York and by David Zenoff, Esq., of the Nevada Bar.

“There has not been nor will there be any claim made by my clients, or by us, for reimbursement of counsel and accountants’ fees or expenses for anyone other than the persons above mentioned and specifically excludes any claim for services allegedly rendered by you. If you believe that your alleged services are compensable, we suggest that you assert so on March 22, 1954, at 10 a.m. before Judge McNamee of the Eighth Judicial District Court of the State of Nevada, at Las Vegas, Nevada, specifying the scope, nature, extent and value of the same, if any.” [653]

Mr. McDonald and other counsel for the defendants were not unaware of my dispute with Messrs. Kipnis and Mittelman and never for a moment were misled that payment to the Castlemans of counsel fees and costs was payment to me of any part thereof. The reason the money was paid to the Castlemans rather than to the attorneys is obvious.

Defendants intended to bind me by paying my clients who they knew would not pay me. Since, however, I rendered the services in effect to RKO in this action I am entitled to be paid by it in this action, particularly when the payment to the Castle-mans in the Nevada action did not include my services, a fact well known to the defendants and counsel.

9. I want to make it clear that I do not oppose the motion to dismiss "in fact" as distinguished from "in law" in behalf of the plaintiffs. In my opinion plaintiffs have been used by Messrs. Kipnis and Mittelman so that they did not and do not fairly represent all the members of the class of stockholders they purport to represent. The fact is that plaintiffs and Messrs. Kipnis and Mittelman do not oppose the dismissal as they did not oppose the dismissal of June 26, 1953, long before Mr. Hughes made any offer which benefited the stockholders.

I oppose defendant's motion to dismiss in behalf of all of the stockholders, including the proposed interveners Eleanor and Julius November.

I oppose the dismissal of this action as an officer of this Court and on the authority in law which I have set forth in the many memoranda which I have filed.

I designate myself as attorney for the plaintiffs only because I wish to uphold the Local Rules of this Court and because I have not been substituted

in accordance with those Rules. So long as I am not substituted, and so long as my name [654] appears of record as attorney for the plaintiffs, I will not permit my clients to do anything by omission or commission which does not contribute to the fair and orderly administration of justice and which is not consistent with the best interests of the whole class which they purport to represent.

/s/ BERNARD REICH.

Subscribed and sworn to before me this 28th day of June, 1954.

[Seal]      /s/ HELEN SPARKMAN,  
Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Filed June 28, 1954. [655]

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[Title of District Court and Cause.]

MOTION FOR COUNSEL FEES AND COSTS  
FROM THE PLAINTIFFS

Comes Now the plaintiffs' attorney, Bernard Reich, and moves this Honorable Court for an order determining the amount of counsel fees and costs for plaintiffs' attorney, Bernard Reich, for judgment in that amount as against the said plaintiffs, and for all proper relief.

Dated: June 28, 1954.

/s/ BERNARD REICH,

Attorney for Plaintiffs. [684]

[Title of District Court and Cause.]

AFFIDAVIT OF BERNARD REICH IN SUPPORT OF MOTION FOR FEES AND COSTS AS AGAINST PLAINTIFFS

State of California,  
County of Los Angeles—ss.

Bernard Reich being first duly sworn, deposes and says:

1. I am attorney of record for the plaintiffs and make this affidavit in support of my motion for fees and costs as against the plaintiffs.

2. On Saturday, December 13, 1952, I received at my home, a telephone call from New York attorneys Leo B. Mittelman and Louis Kipnis. They wanted me to file a minority stockholder action in the state court. They said they would do all the work and were prepared to pay me 10% of the attorneys' fees for acting as their California correspondent. I told them that I wanted to file actions of this kind in the federal court, that I [685] was not the stooge type, and that I wanted to be fully responsible for all papers filed. They said they did not want a stooge, and that they would leave it to our mutual friend Bernard D. Fischman, an attorney, of New York City, to fix my fee in addition to the 10%.

3. By letter of May 18, 1953, Mr. Mittelman confirmed the fee arrangement as follows:

“Re: Terms of Substitution:

“Our agreement was that in consideration of your acting as our local counsel in the California action, you would receive not less than 10% of all the fees we might be awarded in our several actions. In the event of services performed by you in excess of those anticipated, it was agreed that Bernie Fischman would determine whether and to what extent you were to receive any additional sum.

“In our letter of April 16, 1953, we stated ‘Our obligation will survive the California action.’ By that we meant that regardless of the disposition of the California action, we intended to and would honor our agreement with you. In short, please accept this letter as meaning that by stepping out of the action your rights with respect to our arrangements regarding fees and costs will not be prejudiced.”

4. To go back: On Monday, December 15, 1952, I received in the mail the form of complaint filed by Mr. Kipnis in the New York state court. By 3 o'clock of the same day, I had revised the complaint to conform with the jurisdictional requirements of the federal court and filed it.

5. Later, and in March, 1953, I prepared and filed an amended complaint. [686]

6. In view of the representations made by Mr. Kipnis in open Court that he prepared all the pleadings and that all I had to do was to file them, I reproduce hereinafter portions of the correspondence between these New York attorneys for the plaintiffs and myself:

On December 24, 1952, I wrote Mr. Mittelman in part as follows:

“You simply have no idea what Hughes has done to RKO.”

“The fee you mentioned on the telephone would indicate only damages in the sum of \$1,000,000. Hold your hat, but I think Hughes has cost RKO in the neighborhood of \$10,000,000.”

[I was wrong; the figure was nearer \$38,000,000 than \$10,000,000.]

“Remember also that I told you that I did not file the action here as a flunky or even for a \$25,000 fee. I am prepared to amend the complaint.”

On January 5, 1953, I wrote Mr. Mittelman in part as follows:

“In any event don’t you think we ought to amend the complaint even while you are talking settlement?”

On January 21, 1953, I wrote Messrs. Mittelman and Kipnis in part as follows:

“Today’s Hollywood Reporter reports that the motion for appointment of a receiver will be withdrawn on Monday \* \* \*.” [687]

“Almost every day I receive inquiries from the press and from others here in Los Angeles as to whether I am going to amend the complaint.”

By letter of January 23, 1953, Mr. Mittelman

characterized his releases to the press as "double talk" and then stated:

"In connection with your inquiry about amending the complaint, it is our impression that in the classification of breaches of fiduciary obligation a wide area has been covered under which a broad examination could be held. However, we are receptive to any thoughts you might have relative to amending the complaint and we would be pleased to have your thoughts as to the specific items sought to be embraced in the amended complaint." [Later, as we shall see, he changed his mind.]

On February 27, 1953, I advised Mr. Kipnis that I was prepared to amend the complaint in the particulars set forth in five or six pages which constituted my letter.

On February 28, 1953, I sent Mr. Kipnis a copy of the amended complaint which I subsequently filed.

On March 2, 1953, Mr. Kipnis wrote me in part:

"I believe that your amendment to the complaint will make it so broad that no 'Johnny-come-lately' will be able to claim credit for any aspect of the pleading."

"Under the circumstances, I feel that the filing of the amended complaint was a necessary step and an advisable one." [688]

It will be noted that originally Messrs. Kipnis and Mittelman felt that an amended complaint was

not necessary. Not only did they change their mind, but in Nevada and in the face of petitions for intervention, they amended their complaint to conform to the categories which I alleged in the amended complaint.

7. I have in previous affidavits set forth what occurred thereafter as between plaintiffs' New York counsel and myself. I incorporate herein all of those affidavits with the same force and effect as if I were to set them forth *ad hoc* herein.

8. I incorporate by reference in the same way my affidavit filed simultaneously herewith in opposition to the motion to dismiss.

9. For the convenience of the Court, I would summarize all of my affidavits as follows:

(a) Almost from the very beginning plaintiffs' New York attorneys have not acted in good faith so far certainly as I was concerned. They failed to take me into their confidence at several points, to wit, they kept from me as long as possible their meeting with Hughes' representatives at the Cochran Ranch in Indio; they commenced the action in Las Vegas, Nevada, without my prior knowledge or consent; they dropped the receivership proceedings in New York not only without my prior knowledge or consent but after in effect denying that they were going to do so; and they prevented me, or at least tried to prevent me, from doing my duty to the Court and to the stockholders.

(b) Plaintiffs' New York attorneys violated the

agreement made with me that the California [689] action would be prosecuted. In this connection they withdrew over their own signature my notice of deposition of Mr. Hughes; they caused plaintiffs to default on Mr. Hughes' motion to quash the service on him; they tied my hands with respect to the defense of that motion and the motion for security; they planned and schemed with the defendants to have this action dismissed without my knowledge or consent, and then kept the fact from me.

(c) Plaintiffs' New York attorneys violated their duty to this Court by (1) resisting the motion to vacate the order of dismissal which this Court stated was "unfairly presented to it," (2) trying to wrest control of this Court from the local attorney of record for the purpose of having it dismissed and by filing false and contumacious affidavits against him.

(d) Plaintiffs' New York counsel violated their duty to the stockholders by consenting to procedures dictated by the defendants, including the dropping of the New York action, the bringing of the Las Vegas, Nevada, action, and by otherwise not proceeding in a truly adversary action. In this connection it should be noted that plaintiffs' New York attorneys took some 18 depositions and that the first 17 of them consisted of no more than 11 or 13 hundred pages; that 3 or 4 more witnesses gave testimony which brought the grand total of pages to about 2,500.

(e) Plaintiffs' New York attorneys were prepared to accept a \$1,000,000 settlement and it was not to their credit that as elsewhere set forth the settlement amounts to between \$2,000,000 and [690] \$12,000,000.

10. With respect to the issue of my wrongful discharge and the related issue as to my loyalty to plaintiffs' New York attorneys, the facts are briefly these:

Prior to May 7, 1953, I was engaged in prosecuting this lawsuit and in resisting motions made by the defendants. Plaintiffs' New York attorneys did things and were engaged in activities which did not have my approval. I asked to be relieved. On May 7, 1953, Mr. Mittelman wrote to me that he was acceding to my desire "to be substituted out of the case." He wrote:

"Whatever authority we have heretofore granted to you is hereby revoked and cancelled."

On May 11, 1953, I wrote Mr. Mittelman as follows:

"Dear Leo:

"I have your letter of May 7, 1953.

"In my letter of May 5th, to which you allege yours is a response, I wrote:

" 'As I told Slack's partner, Cook, I do not want to be devoured piecemeal. I told him that if he would not press for security I would give consideration to consenting to the motion re Hughes. Neither

he nor you have given me any answer at all on this question of security.

“ ‘I therefore intend, if I am still in the case, to oppose the motion for security on June 8th. To do this successfully I must have the deposition of Howard Hughes for some reasonable time prior to June 8th.’

“In my letter of April 27th I wrote:

“ ‘My question to you still is what is to [691] happen to both motions on June 8th? Also, whether I am free to oppose the motion for security on June 8th with all the proper means available to me.’

“How your letter of May 7th constitutes an answer to my letters is beyond me.

“Is it that you do not wish to oppose either motion?

“I gather from your letters, every one of them, that you do not recall everything you said to me in December when Lou was in California, or what was said to me in my New York hotel room in the presence of Bernie.

“In any event whether it be before Judge Greenberg, Chief Judge Yankwich or Judge Harrison, in New York, in California or in Nevada, in this action or any other action or proceeding, I intend to fulfill my sworn duty to the courts and to the RKO stockholders.

“To go back to just one thing: Soon after the Cochran Ranch conference, Lou was intimating that

the receivership would not be pressed. Then, on January 26, 1953, Lou apparently told Judge Greenberg that since the RKO board had been reconstituted (that is, resumption of Hughes' control), Lou was withdrawing the receivership application.

"Like the matter of the Cochran Ranch, you did not tell me of the withdrawal of the application until after it was done.

"I told you then that this was wrong and made no sense.

"Now Fortune (page 123) states: [692]

" 'The ironic aspect of this whole affair is that the syndicate by its very eagerness to make a fast buck, might have been a distinct improvement over the sort of management RKO has had in the past five years.'

"As to substitution, you say nothing in your letter of my fees or the costs which I have expended. The form of substitution which I sent you in more peaceful days, and which involved a different situation entirely is of course not applicable here.

"Please therefore advise the terms of substitution which you wish me to consider.

"In the meantime, and so that there will be no prejudice to the clients, I am noticing Hughes' deposition which will be absolutely necessary if you wish to oppose the motion for security on June 8th.

"I am noticing the deposition for May 28, 1953. This will give you sufficient time to effectuate a

substitution and withdraw the notice if you still wish to do so. In this way the clients will be protected, in case they want to oppose the motions on June 8th, and will not be prejudiced by me if you do not want to oppose them.

“Incidentally I assume by your postscript that you acknowledge my right to file for other stockholders—although you misunderstood my reference to other facts.

“Sincerely yours,

“/s/ BERNARD REICH.

“cc: Bernard D. Fischman, Esq.”

After a further exchange of letters, Mr. Kipnis wrote me on May 18, 1953, confirming our fee arrangements as above [693] mentioned. In the same letter he wrote me as follows:

“Re: Motion for Security:

“It was not our intention to let the ‘security’ motion go by default. When we write asking you to do nothing, it meant just that—we did not want you to do anything affirmative but that we would.

“As Step One, we are stipulating to a simultaneous adjournment of the security motion plus the notice of taking of deposition of Hughes, all subject to Court approval and without prejudice.

“Therefore, if the stipulation adjourning the ‘security’ motion and the deposition come in before

you are formally substituted, won't you please sign it. If it comes in after you are substituted, then, of course, we will have Herzbrun sign it, and we have so written him."

On May 19, 1953, I accepted Mr. Mittelman's understanding with respect to the fee arrangement but waived any further fees which Mr. Fischman might award me. I asked, however, for a commitment that plaintiffs' New York attorneys would press in Nevada "the charges I made here in California." I offered my full cooperation. I advised that I would sign the stipulation adjourning the security motion, and indicated that had Mr. Mittelman clarified this matter some time ago as I pleaded there would have been no need of the substitution. I wrote: "I suggest further that you prepare a letter agreement which I can file with the defendants in New York, Nevada and California." [694]

I received no answer to my letter of May 19, 1953; but when I heard that Mr. Kipnis, through Mr. Henry Herzbrun, was doing things in California without any formal substitution of me and without the letter agreement which I requested, I wrote to both Mr. Mittelman and Mr. Kipnis on June 26, 1953, that I considered the steps taken as a breach of our relationship and "not in the best interests of the clients." I wrote them further: "Not having heard from you in response to my letter of May 19, and in view of the present circumstances, I withdraw my waiver of any further fees mentioned in my said letter."

I wrote also: "Please prepare and forward to me an agreement of substitution." I received no response to this letter of June 26, 1953; but on or about July 13, 1953, Mr. Kipnis came to my office and we discussed the California action as if it were being prosecuted. All the time Mr. Kipnis knew that he had caused a dismissal of the action on June 26, 1953.

On July 14, 1953, I wrote Mr. Kipnis in care of Mr. Herzbrun as follows:

"Dear Lou:

"I learned for the first time today from the office of Mitchell, Silberberg & Knupp that the above action was dismissed on or about June 26th against all parties and on your written consent. As you well know in view of our conversation last night which was predicated upon the continuation of the suit here, and my substitution by Henry Herzbrun, this information comes as a surprise and a shock to me.

"I believe an appropriate record should be made before Judge Harrison concerning my ignorance of, and [695] the absence of my consent to, the procedure followed.

"I believe also that before you leave California the substitution should be made as well as the agreement for my fees and compensation.

"Advise me immediately when you can meet with me to accomplish what I deem to be absolutely necessary in the circumstances.

"I have this date telegraphed you care of Mitchell, Silberberg & Knupp as follows:

" 'Have Just Been Advised of Dismissal of California Action Against All Defendants With Your Approval But Without My Knowledge. Request Appropriate Record Be Made Before Judge Harison and That You Meet With Me Immediately on Substitution and Fee Agreement.'

"Very truly yours,

"/s/ BERNARD REICH.

"cc: Louis Kipnis, Esq.,  
c/o Hollywood Roosevelt Hotel;  
Bernard D. Fischman, Esq."

By letter of November 4, 1953, Mr. Kipnis wrote me enclosing letters from the clients purportedly ratifying and confirming my "discharge as attorney on May 7, 1953." The letter from the plaintiff Feuerman was dated October 26, 1953, and the letter from the Castlemans was dated October 29, 1953.

11. It will be noted that my differences with plaintiffs' New York attorneys and which brought about my so-called [696] discharge took place prior to May 7, 1953, when Mr. Mittelman wrote me that he was acceding to my request to be relieved. It will be noted furthermore that on May 18, 1953, the fee arrangements were confirmed so that obviously there is no charge of disloyalty prior to May 18, 1953.

12. Any charge of disloyalty could only have

substance if it took place before the confirmation on the last-mentioned date. From what therefore stems the present charges of disloyalty? What was it that I, as an attorney, did after May 18, 1953, which should bar me from obtaining fees and costs?

Did I wrongfully dismiss the action?

It will be noted that after my so-called discharge on May 7th (or when I received the letter), I signed a stipulation continuing the motion for security and the deposition of Mr. Hughes. The fact is that I am still attorney of record and have not been effectively discharged.

13. I would assume that plaintiffs' New York attorneys take the position that by moving to vacate the order of dismissal I was disloyal and that they could properly discharge me for such an act. In the first place they had already discharged me and ratified the fee arrangements. In the second place I was successful in setting aside the wrongful dismissal of this action. It is this order of dismissal which this Court said was unfairly presented to it. Unfairly presented by whom? I would assume that the order was unfairly presented by the defendants and by plaintiffs' New York attorneys. If I was disloyal in successfully moving to vacate the order of dismissal of June 26th, to whom was I disloyal? Was it to the plaintiffs who had brought a representative suit in behalf of all stockholders, or was it to plaintiffs' New York attorneys who had interests in conflict with the best interests of the [697] stockholders?

## 14. To sum up on this point:

My position prior to May 18, 1953, was completely vindicated on that date when plaintiffs' New York attorneys confirmed my fee arrangements and promised to oppose defendant's motion for security. It was plaintiffs' New York attorneys who broke their agreement by dismissing the action and therefore making the motion for security moot. Furthermore, by dismissing the action without my consent and without a formal order of substitution they prejudiced my position as an officer of the Court. That they failed is no credit to them. That I succeeded in restoring this case is likewise no credit to them and certainly is not "disloyalty," except in the sense that I refused to be an accessory before or after the fact.

15. Finding 7, page 5, of the final order in the Eighth Judicial District of the State of Nevada in and for the County of Clark, made April 5, 1954, and being Exhibit 7 to the Affidavit of George Benedict, Jr., made May 24, 1954, provides as follows:

"7. That the plaintiffs Eli B. Castleman, et al., on their motion, have established that they are entitled to recover from such fund their reasonable expenses; that a reasonable allowance to them for such expenses is as follows:

"For attorneys' fees, \$125,000.00;

"For accountants' fees, \$25,000.00;

"For disbursements for expenses of their attorneys, \$8,000.00;

“For disbursements for expenses of their accountants, \$2,000.00;

“that such allowance shall cover all fees for all attorneys who [698] have appeared in any action, wherever pending, on behalf of Eli B. Castleman, et al., the plaintiffs in this action, and all accountants or others who have rendered any services on their behalf, whether or not such attorneys or accountants have appeared in this Court.”

16. Paragraph 2, page 7, of said order provides as follows:

“2. That the cross-motion of the plaintiffs Eli B. Castleman, et al., for allowance of their reasonable expenses is granted; and judgment is here rendered that Eli B. Castleman and Marion V. Castleman, doing business as Wolverine Textile Company, and Louis Feuerman have and recover of and from RKO Pictures Corporation and RKO Radio Pictures, Inc., jointly and severally, the sum of One Hundred and Sixty Thousand (\$160,000.00) Dollars as reimbursement of such plaintiffs for all expenses for attorneys and accountants and other disbursements incident to the prosecution of this and all other actions in which Eli B. Castleman, et al., or any of them, are plaintiffs as stockholders of RKO Pictures Corporation.”

17. It will be noted that the fees and costs awarded by the Nevada court were to be paid to Louis Feuerman and the Castlemans for all legal services rendered to them in all jurisdictions. Under my agreement with their agents, Messrs. Mittelman

and Kipnis, I am entitled to 10% of the fees, that is 10% of \$125,000.00, plus such additional amount as Mr. Bernard Fischman would determine. Since by wrongfully discharging me plaintiffs have obviated the necessity of obtaining the determination from Mr. Fischman or limiting me to the [699] contract price, I am entitled to the reasonable value of my services which, under the law, may exceed 10% even if the determination of Mr. Fischman is not considered, and must exceed 10% if the factor of Mr. Fischman is to be considered.

18. As of the date of this affidavit I have expended in excess of 810 hours and \$1,538.65.

19. Except for eighteen months in the Army, I have continuously practiced law in New York and in California since 1937. Where a charge on an hourly basis is indicated, and I do not so limit myself except for retainer clients, I charge between \$35.00 and \$50.00 per hour, depending upon my client's ability to pay.

20. This case has been exceptionally difficult. The papers of plaintiffs' New York attorneys filed in this Court have been false and scurrilous and have required my attention to the minutest detail. I have had to fight off smokescreen after smokescreen, including false allegations that I had some relationship to the proposed interveners Rosenthal, relationship to the Delaware plaintiffs, Schiff and Sack; that I hospitalized myself in order not to appear in the Las Vegas court, and that I had no

interest other than to collect a fee. I have even had the Rosenberg treason trial brought in by plaintiffs' New York attorneys as some precedent for action which this Court was asked to direct against me. My authority to act for the plaintiffs was challenged. Even my authority to act for the proposed interveners Novembers was challenged. Here then was the only attorney of record, myself, being challenged by plaintiffs' New York attorneys who are not and have never been attorneys of record for the plaintiffs in this action in accordance with the Local Rules of this Court. I have had my appearance challenged by Mr. Robert Silver acting [700] for plaintiffs' New York attorneys, but who has never himself filed an appearance as attorney of record, and who has not been substituted in accordance with the Local Rules of this Court. I have had my deposition taken, an astounding thing in itself, and wherein Mr. Silver examines me and Mr. Raymond Cook of Texas representing Mr. Hughes cross-examines me.

21. No award made by this Court can compensate me for the effort which I have made in this case. This I knew at the outset when I informed this Court that I wished only to act as an ethical officer who had a duty to present the facts and whose duty to the Court and to the stockholders transcended any possible duty he had to his New York correspondents. Now that the battle has been won and Mr. Hughes, no thanks to Messrs. Kipnis and Mittelman, has paid between \$2,000,000 and

\$12,000,000 in settlement of the lawsuits against himself, and in view of the fact that Messrs. Kipnis and Mittelman have been paid \$125,000 for the services they purportedly rendered, I do not in good conscience feel that I should waive my fees for the benefit of Messrs. Kipnis and Mittelman or the corporations which have harvested the crop which I have sown.

22. In my affidavit in support of my motion for counsel fees and costs against the RKO defendant, I have tried to spell out how I arrived at the settlement figure of between \$2,000,000 and \$12,000,000, and what part I played in bringing about that settlement. In this affidavit I have already demonstrated in part the fact that Messrs. Kipnis and Mittelman would have been content with a \$1,000,000 settlement. I know this from a telephone conversation had with Mr. Mittelman soon after the Cochran Ranch conference, from the fact that neither Mr. Kipnis nor Mr. Mittelman denied it in answer to my letters, and from Mr. Kipnis in my office here in Beverly Hills on July 13, 1953, [701] when he told me that the 1952 loss by RKO of \$10,000,000 was a paper loss, and from the fact that he brushed off any evidence that I gave him to the contrary.

23. I was informed by Mr. Bernard Fischman that Mr. Mittelman claims to have paid Mr. Robert Silver \$5,000.00 counsel fees for the work done by Mr. Silver in this case. So far as I know Mr. Silver

filed only the papers prepared for him by Messrs. Kipnis and Mittelman and took my deposition.

24. One final word: The papers which I have filed and my arguments to this Court at the many hearings I hope will bear me out in the simple statement that I tried only to do my duty to the Court and to the stockholders and that I tried to conduct myself with dignity, doing only what I must, and defending myself temperately and in keeping with the sworn duty of an officer of this Court.

/s/ BERNARD REICH.

Subscribed and sworn to before me this 28th day of June, 1954.

[Seal]     /s/ HELEN SPARKMAN,  
Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Filed June 28, 1954. [702]

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[Title of District Court and Cause.]

MOTION FOR COUNSEL FEES AND COSTS  
FROM THE DEFENDANTS OTHER THAN  
BANK

Comes Now plaintiffs' and proposed interveners' attorney, Bernard Reich, and moves this Honorable Court as follows:

1. In the event that the Court dismisses the within action, that it determine the reasonable value

of the legal services rendered by attorney, Bernard Reich, for the benefit of the RKO defendants, determine the amount of costs expended, enter judgment in favor of said Bernard Reich for the amounts fixed and determined, and condition dismissal on the payment of said judgment by the defendants other than The Chase National Bank.

2. For all proper relief.

Dated: June 28, 1954.

/s/ BERNARD REICH,

Attorney for Plaintiffs and  
Proposed Interveners. [712]

[Title of District Court and Cause.]

AFFIDAVIT OF BERNARD REICH IN SUP-  
PORT OF MOTION FOR COUNSEL FEES  
AND COSTS AGAINST THE DEFEND-  
ANTS

State of California,  
County of Los Angeles—ss.

Bernard Reich, being first duly sworn, deposes and says:

1. I am the attorney for the plaintiffs and proposed interveners and make this affidavit in support of the motion for counsel fees and costs as against the defendants.

2. This is a stockholders' minority or derivative suit, in which the fees and costs of an attorney are

paid by the corporation which in fact and in law is the beneficiary of such suit.

3. It should be noted at the outset that while the defendant Hughes is nominally represented by counsel other than those who represent the corporation defendants, nevertheless there is no serious question but that Mr. Hughes dominated and controlled the [713] corporations and that the corporations' counsel was and is therefore Mr. Hughes' counsel.

4. It was because of Mr. Hughes' domination of the corporations and their directors that these corporations and directors who were non-residents of the State of Nevada nevertheless submitted to its jurisdiction for Mr. Hughes' personal convenience, benefit and purposes.

5. I incorporate by reference my affidavit submitted simultaneously herewith in opposition to the defendant RKO's motion to dismiss, and my affidavit in support of the motion for counsel fees and costs against the plaintiffs.

6. I incorporate by reference all of my affidavits heretofore filed in this action.

7. I press all my motions heretofore made and which have not been determined by this Court.

8. I resist defendants' motion to dismiss for the reasons set forth herein and in the memorandum submitted herewith in opposition to that motion.

9. Should, however, this Court be inclined to dis-

miss this action, then I respectfully request it to act on the motion herein for counsel fees and costs as did the Court in Las Vegas, Nevada, by its order of the 30th day of March, 1954, being Exhibit 4 to the Affidavit of George Benedict, Jr., dated the 24th day of May, 1954, and the Judgment of the 1st day of April, 1954, being Exhibit 6 to the Affidavit of George Benedict, Jr., dated the 24th day of May, 1954.

10. Attached hereto, marked Exhibit "A" and made a part hereof is a true and correct statement of the time expended by me or for me in this matter. It shows that up to the date of this affidavit there was expended 648 hours. As is the case with every practicing lawyer, not every minute or hour is recorded. [714] I would estimate unrecorded time as 25% of the recorded time, making a total of 810 hours expended.

11. Attached hereto, marked Exhibit "B" and made a part hereof is a true and correct statement of the disbursements made by me. It shows that to the date of this affidavit I have expended and advanced the sum of \$1,538.65.

12. Under letter of February 7, 1954, the defendant Hughes purportedly wrote to the defendant RKO Pictures Corporation offering "to purchase" all of its assets, "including any and all claims or causes of action" against him. He offered to pay \$23,489,478. Since there was outstanding 3,914,913 shares Mr. Hughes admitted that this amounted to

\$6.00 per share. At the time of the offer the stock was selling at \$2.87 per share.

13. It was my position and reaction immediately, and I stated it to this Court on the 15th day of February, 1954, that Mr. Hughes' offer to purchase was in effect an offer to compromise the lawsuits against him for \$12,000,000. I arrived at that figure in the following manner: I rounded out the \$2.87 per share figure to \$3.00. I rounded out the \$23,489,478 figure to \$24,000,000. I rounded out the 3,914,913 number of shares figure to 4,000,000. Mr. Hughes' offer of, in effect, \$6.00 per share was therefore an offer of more than \$3.00 over the market price of the stock. I took the \$3.00 figure and multiplied it against the 4,000,000 number of shares figure to arrive at the sum of \$12,000,000.

As set forth in my affidavit in opposition to the motion to dismiss, the Delaware court, in its decision dated March 26, 1954, stated that the board of directors, on the recommendation of RKO's general counsel, allocated \$2,000,000 to the lawsuits.

We are therefore discussing a settlement of between \$2,000,000 and \$12,000,000. [715]

14. At the hearing at which I made that analysis, Mr. Cook representing Mr. Hughes in effect rejected my suggestion that the offer was a compromise. It was Mr. Cook's position that it was an offer to purchase. This in effect was the position taken by Mr. Hughes' attorneys in the Eighth Judicial District of the State of Nevada in and for the

County of Clark when they moved that Court to dismiss on the ground that Mr. Hughes' offer to purchase of February 7, 1954, would extinguish the claims against Mr. Hughes and render the action moot. This motion to dismiss and the offer to purchase is on file here as Exhibit L to the Affidavit of George Benedict, Jr., dated June 8, 1954.

15. It was not until the hearing on the said motion to dismiss in Nevada that the fairness of the offer to purchase was put in issue by the defendants and it was not until after the Court found that the offer to purchase was fair that there was any admission that the offer to purchase was in fact an offer to compromise. The moving defendant in its Memorandum supporting the motion to dismiss made the admission as follows:

“Since the offer [to buy] included a recitation that it was for all assets, including any claims or causes of action RKO might have against any person, including Hughes, it could be viewed as having the aspects of a settlement of the derivative actions then pending. On February 11, 1954, Hughes moved in the Castleman-Nevada action for a dismissal thereof with prejudice, on the ground, among others, that consummation of the sale would render the action moot as to him.”

Please note that Mr. Hughes' offer to buy was made under date of February 7, 1954, and that the motion to dismiss was made on February 11, 1954, before the date of consummation. Please [716] note

also that if the offer of Mr. Hughes made February 7th could be viewed as having the "aspects of a settlement" that fact could have been made clear and part of the motion made by Mr. Hughes on February 11, 1954. And finally, please note also that while the Memorandum in support of the motion to dismiss here states that the motion was made on the ground "among others" that the Nevada action was moot, the fact is that the other grounds did not include any notice that the offer to buy could be viewed as having the "aspects of a settlement of the derivative actions then pending."

16. Why was it necessary belatedly to admit that the position I took months previously was correct, that is, that Mr. Hughes' offer to purchase was in fact an offer to compromise? If Mr. Hughes' offer to purchase is not an offer to compromise, then a dismissal of the Nevada suit for mootness would not be *res judicata* in this Court. This Court, before it could dismiss, would have to decide as a matter of law that a defendant in a stockholders' derivative action buying up the assets of the corporation, including the claims against himself, rendered an action moot. This raises a very serious question. My own position would be that any stockholder who did not sell out to Mr. Hughes could continue to maintain the suit, and I so informed the Court at the hearing on the 15th day of February, 1954. On the other hand, if Mr. Hughes was in fact compromising the lawsuits against him, and if the action in Nevada was truly adversary and

not collusive, then the claim could be made here in this Court that the judgment rendered in Nevada was *res judicata*. This is the reason for the switch in theories by the defendants and it will be noted that the switch took place after I made my position clear that Mr. Hughes could not avoid the prosecution of this lawsuit by any such plan [717] as buying up the claims against himself.

17. As demonstrated in my affidavit in support of the motion for counsel fees and costs against the plaintiffs, Messrs. Kipnis and Mittelman would have been satisfied with a settlement of \$1,000,000. It is therefore apparent that they did not induce Mr. Hughes to offer \$12,000,000 or even \$2,000,000. Since in the Delaware and New York proceedings the stockholders, Schiff and Sack, were unsuccessful, it is apparent that their attorneys did not induce Mr. Hughes to "compromise." In his offer dated February 7, 1954, Exhibit A to Exhibit 1 attached to the Affidavit of George Benedict, Jr., dated June 8, 1954, Mr. Hughes states:

"(a) There have been expressions of dissatisfaction among the stockholders.

"(b) I have been sued by certain of the stockholders and accused of responsibility for losses of the corporation."

The actions to which Mr. Hughes referred were obviously those in New York, California and Nevada. By February 7, 1954, the date of his offer, Mr. Hughes was successful in New York, and as

indicated was not sorely pressed in Nevada. The only place that he was pressed was in this action and by the local attorney of record for the plaintiffs.

18. Mr. Hughes was successful in New York because the challenge of collusion there was predicated upon hearsay. That is, it was predicated at least in part on the affidavits which I have filed here. I took no part in the New York action. I did not even furnish the affidavits. My deposition was not taken and I gave no evidence. Also in New York they never had jurisdiction over Mr. Hughes. I believe I had and have; or at least Mr. Hughes knew that the order which dismissed him was [718] not final and was being effectively challenged in the California action which had been revived and was very much alive.

19. I believe I underestimate when I say that this action in California which the defendants tried unsuccessfully to dismiss and where the real issues eventually had to be met was an inducing factor in Mr. Hughes' finally admitted offer to compromise.

20. It is not necessary for me to claim that I was the sole inducing force. It is enough to prove that the corporations benefited to the extent of \$12,000,000 or even \$2,000,000, and that I rendered legal services in connection with the various cases which led to the compromise. As the legal memoranda filed establish, it is not necessary that there even be a fund or that if there is a fund that it has to be in the hands of this Court.

21. Defendants now admit that the offer to purchase was in fact an offer to compromise, and the mathematics show that the offer to compromise was \$12,000,000, or \$2,000,000, if the allocation of the RKO Board of Directors is conclusive. Defendants admit that \$125,000 was fixed as the reasonable value of the services rendered by Messrs. Kipnis and Mittelman in Nevada. They have not appealed from the final order. If then Messrs. Kipnis and Mittelman are entitled to \$125,000 for services rendered leading to a \$1,000,000 settlement, what is the reasonable value of the legal services rendered by an attorney who, to say the least, tried to put backbone into Messrs. Kipnis and Mittelman with the evidence that the claims were worth upwards of \$10,000,000?

22. As partially indicated in my affidavit in support of the motion for counsel fees and costs against the plaintiffs, this has been a difficult matter, bitterly contested. This [719] stems from the fact that anyone who stands up to be counted on the side of justice and equity must expect to have mud thrown at him. The defendants were represented by strong and able counsel. There was bound to be the issue of personal integrity as to all counsel. This does not make for a quiet, dispassionate lawsuit.

23. Moreover, while the smearing was done by plaintiffs' New York attorneys, the defendants took advantage of the situation to confuse the issues and create almost but not quite, insurmountable obsta-

cles and diversions in New York, Delaware, and Nevada.

24. When the plaintiffs through their New York counsel refused to advance the costs I felt it my duty to advance them in the interests of justice and in conformity with my ideas of the duties of an officer of this Court. In that connection I pledged my credit and guaranteed payment of the fees of any Special Master that this Court would appoint. The fact that this Court has not to date appointed a Special Master does not reflect to my discredit or deny the fact that in the interests of establishing the facts I was willing to guarantee payment of fees.

25. There is one other factor which I believe should be weighed by this Court in fixing my fees, and that is the possible effect of this case on my practice, past and future.

On April 6, 1953, Mr. Kipnis wrote me as follows:

“You cannot deny that Mr. Hughes is a formidable and resourceful antagonist. Moreover, he has unlimited funds at his disposal. We were able to corner him in Nevada on the basis of a film reporter’s tip. Apparently Mr. Hughes found it inconvenient to oppose our attack in Nevada, nor did he have available in that jurisdiction [720] the security statute available to him in New York and California. Without looking too closely into his motives, with which I am not presently concerned, I realize that we now have a device which makes it

possible for us to move forward rapidly and without harassment and interminable motion procedures.”

There is no question of Mr. Hughes’ power and influence in this community. The almost complete blackout in the newspapers of the proceedings had in this case is evidence of it. I know of my own knowledge that the working members of the entertainment industry are in fear of him. They either have worked for him, are working for him, or hope to work for him. While I am sure that there is some measure of respect from these people for my “courage,” I am equally sure that a good many of them do not want to link their names with that of a lawyer who has thwarted or “bucked” Mr. Hughes. In other words I do not think that this lawsuit has, to say the least, helped my practice. Actually I am persuaded to the contrary.

26. Part of the smear in this case has been the insistence by counsel on the other side and by plaintiffs’ New York counsel that my sole interest was a fee. They could not appreciate apparently that a young lawyer (really not so young) could put his duty to the Court and to the stockholders above his self-interest. As I told this Court earlier I could have taken a quick profit of what could have been at least \$12,500 (i.e., 10% of \$125,000) and ran. Moreover, as the Court pointed out in one of many hearings, its award to me would not be final and I should be prepared to spend my substance in the appellate courts. I aver again that my [721] primary motivation throughout this action was to

fulfill my sworn obligations to the Court and to the stockholders. I believe I have been vindicated. If waiving my fee in this action would contribute also to the fair administration of justice, I would gladly do so. It happens that the contrary is true. If Mr. Hughes or his corporations avoid the payment of my fees then justice will have miscarried, as it has at Mr. Hughes' instance in other courts and in other places.

Wherefore I respectfully pray that if this Court dismisses the action, it should fix and determine my counsel fees and costs and condition any dismissal on payment of them to me by the defendants.

/s/ BERNARD REICH.

Subscribed and sworn to before me this 23rd day of June, 1954.

[Seal]     /s/ HELEN SPARKMAN,  
Notary Public in and for the County of Los Angeles, State of California. [722]

## EXHIBIT A

## Daily Time Sheets

Date	Nature of Service	Time
1952		
12/13—	Tel. from Leo Mittelman, Kipnis; Tel. to Fischman .....	.8
12/14—	Tel. from Fischman .....	.4
12/15—	Letter from Kipnis; Tel. to Mittelman; Prepared Complaint; Telegram to New York; Tel. to Clerk (2); Filed Complaint; Research; Misc. ....	7.
12/16—	Memo. to file; Letter to Mittelman and Kipnis; Misc. ....	1.
12/22—	Tel. to B. Fischman; Leo Mittelman..	.5
12/30—	Letter to Fischman .....	.4
1953		
1/5 —	Letter from and Letter to Mittelman..	.4
1/21—	Letter to Mittelman and Kipnis; Misc.	.4
1/26—	Letter from Mittelman; Letter to Fischman .....	.5
2/2 —	Tel. to Fischman .....	.4
2/4 —	Notice from Court; Tel. to Judge Harrison .....	.5
Total carried forward .....		12.3

Exhibit A—(Continued)

Date	Nature of Service	Time
	Brought forward .....	12.3
2/5	—Letter to Judge Harrison; Conference Judge Harrison; Conference New York lawyers .....	2.
2/11 to		
2/18—	New York trip — Conferences Mittel- man, Kipnis and Fischman.....	3.
2/25—	Letter from and Letter to Kipnis; Misc. ....	1.5
2/27—	Letter to Kipnis (2); Revised Com- plaint; Tel. to George Cohen; Misc....	5.
3/2	—Court appearance .....	.5
3/3	—Letter from Kipnis; Revised Amended Complaint .....	2.
3/4—	Letter from and Letter to Kipnis; Filed Amended Complaint; Misc. ....	3.
3/6	—Tel. from Kipnis; Tel. to and from Lipstich of RKO; Tel. from Marshal; Misc. ....	1.
Total carried forward.....		30.3
3/12—	Letter from and Letter to Kipnis.....	.4
3/17—	Letter from Kipnis .....	.2
3/16—	Letter to Kipnis; Tel. from Kipnis; Tel. to Knupp (2) .....	1.5
3/17—	Rec'd Stipulations from Mitchell, Sil- berberg & Knupp .....	.4
3/24—	Letter from and Letter to Kipnis.....	.5

## Exhibit A—(Continued)

Date	Nature of Service	Time
3/30—	Letter from and Letter to Kipnis.....	.6
4/1 —	Memo to file; Letter from Mittelman..	.4
4/2 —	Rec'd copy of Notice of Motion for Security for Expenses; Tel. to Fisch- man .....	.5
4/3 —	Tel. to Kipnis; Tel. to and from Knupp; Notice of Deposition; Letter to Kipnis (2); Letter from Kipnis; Tel. from Kaufman (2); Letter to Kipnis; Research .....	4.
Total carried forward .....		38.8
4/8 —	Letter from and Letter to Mittelman; Tel. to Fischman, N. Y.....	1.5
4/9 —	Letter to Fischman; Tel. from and Tel. to Knupp; Revised Stipulation; Misc.	1.5
4/13—	Letter from and Letter to Mittelman and Kipnis; Court appearance; Tel. to Fischman, N. Y. ....	3.
4/14—	Tel. to Kipnis; Letter to Knupp.....	.6
4/15—	Tel. from Knupp .....	.4
4/16—	Conference Knupp; Judge Harrison..	3.
4/20—	Letter from and Letter to Mittelman; Tel. from and Tel. to Knupp.....	1.5
4/24—	Tel. to and Tel. from Fischman, N. Y.; Letter from Kipnis; Tel. to Fresno; Conference Raymond Cook; Tel. to Knupp; Tel. to Cook, Warne .....	4.
Total carried forward .....		54.3

Exhibit A—(Continued)

Date	Nature of Service	Time
	Brought forward .....	54.3
4/26—	Tel. from Mittelman .....	.2
4/27—	Court appearance; Tel. from Fischman, N. Y.; Letter to Kipnis and Mittelman; Memo to file.....	2.5
5/5 —	Letter to Kipnis and Mittelman.....	.4
5/6 —	Tel. to Odium, Fischman, N. Y.....	1.
5/7 —	Memo to file .....	.4
5/8 —	Letter from Mittelman; Misc.....	.4
5/11—	Dictated Notice of Deposition; Letter to Mittelman; Letter to Fischman....	1.
5/13—	Tel. to Knupp .....	.4
5/14—	Letter to Odium; Letter from Kipnis; Tel. from Fischman, N. Y.....	1.4
5/15—	Letter to Kipnis; Tel. from and to Herzbrun; Conference Herzbrun and DeGroot; Letter to Fischman.....	3.
Total carried forward .....		65.0
5/18—	Letter to Odium; Misc. ....	.4
5/19—	Letter from and Letter to Mittelman; Tel. from Herzbrun .....	.6
5/21—	Tel. from Knupp .....	.3
5/22—	Letter and Stipulation from Knupp; Tel. from Knupp; Letter to Knupp; Tel. to Odium .....	.9
5/25—	Letter to Fischman .....	.4
5/26—	Tel. to Herzbrun .....	.3

## Exhibit A—(Continued)

Date	Nature of Service	Time
6/5	—Tel. to Knupp; Tel. from Herzbrun; Misc. ....	.5
6/11	—Tel. from Fischman, N. Y.....	.4
6/12	—Letter to Odlum .....	.4
6/26	—Letter to New York attorneys; Misc...	.5
6/29	—Notice from Clerk; Checked with Hocke .....	1.
Total carried forward .....		70.7
7/1	—Tel. to Herzbrun; Guy Knupp.....	.3
7/13	—Telephone Conference Kipnis.....	2.5
7/14	—Tel. from and Tel. to Benedict, Fisch- man, Sam DeGroot; Telegram and Let- ter to Kipnis; Dictated Agreement; Research; Tel. from Kipnis (2); Tel. to Warne (2) .....	4.2
7/15	—Letter to McDonald; Memo to Warne; Dictated Affidavit; Tel. to Fischman; Tel. to Warne (3); Tel. from Kipnis; Tel. from Benedict .....	2.5
7/16	—Tel. from Cook; Tel. to Benedict; Let- ter and Order from Benedict; Tel. to Warne .....	1.
7/20	—Tel. from Warne .....	.3
7/22	—Letter to Fischman .....	.4

Exhibit A—(Continued)

Date	Nature of Service	Time
7/24—	Tel. to Warne; Knupp; Conference, Dictated Letter to Kipnis and Mittel- man for Pacht, Tannenbaum & Ross..	2.3
Total carried forward .....		84.2
7/29—	Letter from Warne; Tel. to DeGroot, Warne; Tel. from Herzbrun; Misc....	1.
7/30—	Copy of letter from Warne; Letter to Gilson; Research County Law Library; Conference Warne .....	2.
7/31—	Letter from and letter to Fischman...	.5
8/3 —	Letter from and letter to Gilson.....	.4
8/6 —	Copy of letters from Warne; Tel. to and tel. from Warne; Tel. to Judge Harrison's Clerk; Conference Judge Harrison, Warne; Tel. to Hocke ....	2.5
8/7 —	Dictated drafts of moving papers re Order of June 26th; Letter to Warne.	2.5
8/10—	Tel. to Fischman; Dictated Memorand- um of Points and Authorities; Re- search; Tel. to Warne .....	3.5
8/11—	Memo to Warne; Letter to Fischman; Revised moving papers; Tel. to Warne (3); Delivered drafts to Warne's office .....	2.5
Total carried forward .....		99.1

## Exhibit A—(Continued)

Date	Nature of Service	Time
	Brought forward .....	99.1
8/12—	Revised Affidavit; Tel. to Warne; Letter to Fischman; Tel. to Odum, N. Y.; Memo to Fischman; Misc. ....	3.
8/13—	Letter to Gilson .....	.4
8/14—	Misc. ....	1.
8/17—	Letter from Warne (2); Letter from and letter to Fischman; Misc.....	1.
8/21—	Misc. ....	.5
8/25—	Revised Affidavit; Letter to Fischman; Memo to file; Misc. ....	1.5
8/26—	Conference M. Silberberg; Revised Affidavit; Misc. ....	4.
8/27—	Tel. to and tel. from Fischman, N. Y.; Revised Affidavit; Letter to Fischman; Tel. to Judge Roth, Silver; Misc.....	2.5
8/28—	Misc. ....	.5
Total carried forward .....		113.5
8/31—	Letter to Gilson; Tel. to Roth and Gunter; Tel. to Warne .....	.6
9/1 —	Memo to Gunter .....	.3
9/2 —	Tel. from Gunter (2) .....	.5
9/3 —	Received copies of letters from Warne; Letters to Fischman (2); Meeting Roth and Gunter .....	2.5
9/4 —	Revised Affidavit .....	.4
9/5 —	Dictated Outline .....	1.

Exhibit A—(Continued)

Date	Nature of Service	Time
9/6	—Rec'd telephone call from Fischman; Dictated letter to Fischman.....	1.
9/8	—Tel. from Fischman .....	.5
9/9	—Telegram from Fischman; Misc.....	1.
9/10	—Filed Affidavit; Letter to Fischman; Letter to Gilson; Misc.....	2.
9/11	—Letter to New York County Clerk; Letter to Gelfand; Misc.....	1.
Total carried forward .....		154.3
9/14	—Misc. ....	1.
9/15	—Letter from Fischman; Letter from and letter to Gilson; Misc.....	.5
9/16 to		
9/29	—New York—Conferences Golub, Fisch- man, Gelfand, Harry; Tel. from Brandlin, Weisl, Cole .....	72.
9/30	—Dictated Opposing papers; Conference Brandlin; Received Opposing papers from Mittelman, etc., Checked file....	5.5
10/1	—Received McDonald's affidavit; Re- search; Dictated opposing affidavits, supplemental memorandum; Misc.....	7.
10/2	—Filed reply affidavits; Conference Schwartz; Misc. ....	5.
10/5 to		
10/9	—Letter from Gluckman, Schweig.....	.5

## Exhibit A—(Continued)

Date	Nature of Service	Time
10/12—	Tel. to Hocke; Letter to Gluckman, letter to Schweig; Letter from and let- ter to Mittelman; Tel. to Fischman; Tel. to Brandlin, Ambrose; Misc.....	2.
Total carried forward.....		247.8
10/13—	Received motion papers; Conference Brandlin; Dictated letter to Judge Mc- Namee, Judge Harrison, Order .....	2.5
10/14—	Studied defendants' motion papers; Received and studied Herzbrun's mo- tion; Tel. from Brandlin; Letter to Judge McNamee; Tel. to Knupp, Warne; Received Transcript; Misc. . .	4.
10/15—	Dictated opposing papers to Herzbrun motions; Conference Schwartz; Tel. to Warne (2), Knupp (2); Conference Knupp; Stipulation re Continuance of defendants' motions; Research; Misc. .	7.
10/16—	Received Silver's affidavit; Prepared and revised reply affidavit; Conference Ben Schwartz; Misc. ....	5.
10/17—	Misc. ....	.5
10/19—	Appearance before Judge Harrison; Tel. from Brandlin, Schwartz; Misc. . .	3.
10/20—	Confer. Brandlin, Vaughn, Schwartz .	1.5
Total carried forward .....		271.3

Exhibit A—(Continued)

Date	Nature of Service	Time
	Brought forward .....	271.3
10/21—	Tel. to Fischman, N.Y.; Tel. to and Tel. from Schwartz' office; Letter from McDonald; Letter to Woodburn; Misc.	3.
10/22—	Tel. to and tel. from Schwartz' office; Tel. from Fischman, N.Y.; Misc. ....	2.5
10/23—	Tel. to New York; Tel. from Selvin, Schwartz; Letter to Judge McNamee; Conference Selvin; Tel. to Ambrose ..	4.
10/26—	Letter from Kipnis; Telegram to Judge McNamee; Misc. ....	1.
10/27—	Misc. ....	.5
10/28—	Conference Schwartz, Selvin; Misc. ...	3.5
10/29—	Conference Selvin; Dictated letter to Judge McNamee; Letter from and let- ter to Silver; Misc. ....	2.
10/30—	Letter to Judge McNamee; Conference Schwartz, Selvin; Misc. ....	3.5
Total carried forward .....		291.3
11/2 —	Conference Selvin; Misc. ....	.4
11/5 —	Letter to Silver; Misc. ....	1.
11/6 —	Misc. ....	1.5
11/10—	Memo to Schwartz; Letter to Selvin ..	.5
11/11—	Misc. ....	2.
11/12—	Dictated moving papers; Tel. to Palm Springs, New York; Misc. ....	6.
11/13—	Tel. from Silberberg; Misc. ....	2.

## Exhibit A—(Continued)

Date	Nature of Service	Time
11/13 to		
11/15—Las Vegas .....		24.
11/16—Filed papers; Misc. ....		1.5
11/17—Letter from and letter to November; Letter to Fischman; Misc. ....		1.
11/18—Misc. ....		1.
11/19—Tel. to Fischman, N.Y., Nidorf; Tel. to Schwartz (2); Tel. from Silberberg, November, Schwartz; Memo to Schwartz, Hall, Adler; Conf. Nidorf, Schwartz; Misc. ....		4.
Total carried forward .....		336.2
11/20—Research; Dictated Memorandum of Points and Authorities, etc.; Confer- ence Misc. ....		6.
11/23—Memo to Schwartz; Checked Memoran- dum in support of motion; Misc. ....		2.
11/24—Conference Paul Ziffren; Memo to Chantry; Misc. ....		2.3
11/30—Court appearance; Memo to File; Let- ter from and letter to Ringer; Confer- ence Alschuler; Dictated Memorandum of Points and Authorities re Compens- ation Special Master .....		4.
12/3 —Memo to Schwartz .....		.3
12/4 —Letter to Fischman; Misc. ....		.5
12/9 —Memo to Schwartz; Received Subpoena		.5

Exhibit A—(Continued)

Date	Nature of Service	Time
12/10—	Received Memorandum opposing affidavits re Special Master .....	.5
12/11—	Studied Silver's Memo; Received and Studied Knupp's memo; Conf. Schwartz .....	2.
Total carried forward .....		354.3
12/14—	Appearance before Judge Harrison; Memo to Schwartz; Misc. ....	5.5
12/15—	Bernard Reich Deposition; Revised Order re Dismissal; Received Transcript of 11/30; Misc. ....	3.
12/16—	Tel. to Knupp; Letter to Judge Harrison .....	1.
12/18—	Tel. to and tel. from Murdock; Corrected and revised original deposition; Misc. re service on Hughes .....	4.
12/21—	Letter to Gilson; Memo to Schwartz; Tel. to Schwartz; Misc. ....	2.
12/22—	Conference Schwartz; Misc. ....	2.
12/23—	Tel. to Foley; Conference Schwartz; Telegram and letter to Foley; Misc. ..	2.5
12/24—	Letter from Kipnis; Misc. Proposed Order .....	3.
1954		
1/4 —	Letter to Ringer; Tel. to Fischman; Misc. ....	1.7
Total carried forward .....		379.0

## Exhibit A—(Continued)

Date	Nature of Service	Time
	Brought forward .....	379.0
1/5	—Letter to Fischman, Foley .....	.5
1/6	—Misc. ....	2.
1/8	—Misc. ....	.3
1/11	—Appearance before Judge Harrison; Memo to file; Telegram to New York Appellate Division; Misc. ....	2.8
1/15	—Misc. ....	1.
1/18	—Letter from and letter to Campbell, Clerk Appellate Court, N.Y.; Tel. from Fischman, N.Y. ....	1.
1/19	—Conference Lester Reinwald of Ring- er's office; Tel. to Clerk ....	1.
1/25	—Letter to Foley; Tel. from Schwartz; Misc. ....	.5
1/28	—Tel. to Fischman; Dictated affidavit on motion to vacate in part; research; Misc. ....	5.5
1/30	—Dictated Motion, Memo of Points and Authorities; Notice of Hearing .....	4.
Total carried forward .....		397.6
2/1	—Checked and corrected papers; Letter from Nevada; Read transcripts; Misc. ....	2.5
2/2	—Rechecked papers; Misc. ....	1.
2/3	—Checked court paper file; Dictated Notice of Intention to Take Deposition of Hughes; Misc. ....	2.

Exhibit A—(Continued)

Date	Nature of Service	Time
2/4	—Telegram to Foley; Misc. ....	1.
2/5	—Misc. ....	.5
2/8	—Tel. to Schweig, N.Y., Ringer; Tel. to Ziffrin; Conference Schwartz; Tel. to and tel. from Schwartz; Misc. ....	4.
2/9	—Misc. ....	.5
2/10	—Misc. ....	1.
2/11	—Affidavit from Kipnis; Letter from Ringer; Misc. ....	1.5
2/12	—Telegram from Schwartz; Misc. ....	.5
Total carried forward .....		412.1
2/15	—Appearance before Judge Harrison; Letter to November, Foley; Misc. ....	5.5
2/16	—Conference Prinzmetal; Misc. ....	1.
2/17	—Misc. ....	.5
2/19	—Letter from and letter to November; Misc. ....	1.
2/20	—Tel. to Odhum .....	.5
2/23	—Letter from and letter to Lowy; Conference Schwartz .....	1.
2/24	—Research; Memo to Schwartz; Misc. ..	3.
3/5	—Dictated Petition, Motion, etc. ....	2.5
3/8	—Revised Petition, etc. ....	.5
3/9	—Dictated Affidavit .....	.5
3/10	—Letter from and letter to Kipnis; Dictated Memorandum; Misc. ....	3.
3/11	—Filed Intervention papers .....	.3
Total carried forward .....		430.9

## Exhibit A—(Continued)

Date	Nature of Service	Time
	Brought forward .....	430.9
3/12—Misc. ....		.5
3/15—Misc. ....		.5
3/22—Tel. to Foley, Vegas; Misc. ....		1.
3/24—Received and answered affidavit in opposition .....		1.5
3/26—Conference Schwartz; Tel. to Benedict, Silver, Clerk .....		1.5
3/29—Appearance before Judge Harrison; Misc. ....		3.5
3/30—Letter and affidavit to November; Misc. ....		1.5
3/31—Misc. ....		2.5
4/1 —Misc. ....		.3
4/3 —Research .....		.3
4/5 —Misc. ....		.3
4/8 —Received papers re Motion to Dismiss; Conference Warne .....		1.
Total carried forward .....		445.3
4/9 —Dictated Memorandum; Misc. ....		1.5
4/12—Received Notice of Depositions; Letter to witnesses; Misc. ....		1.
4/13—Dictated Motion to Quash, Affidavits (2); Proposed Order, Memorandum of Points and Authorities; Misc. ....		2.5
4/14—Checked papers; Tel. from Foley; Memorandum to and conference with		

Exhibit A—(Continued)

Date	Nature of Service	Time
	Selvin; Conference Gittelson; Tel. to Court's secretary .....	3.
4/15—	Conference Judge Harrison; Telegram to Cook, et al., Letter to witnesses; Letter from Gelfand; Tel. from Benedict, Silberberg; Misc. ....	3.
4/16—	Conference I. Pacht; Misc. ....	2.5
4/21—	Letter from Fischman; Letter to Marshall, Schwartz .....	1.5
4/22—	Conference Pacht, Silberberg; Misc. ..	2.5
4/23—	Letter from Marshall, Letter to Katz .	.5
	Total carried forward .....	463.3
4/26—	Letter to Fischman; Letter from and letter to Kipnis .....	1.5
4/29—	Telephone to Golub, New York.....	.5
4/30—	Telephone from Golub; Conference Selvin; Misc. ....	2.
5/3 —	Tel. to Fischman, N.Y.; Letter from Fischman, Silberberg .....	1.
5/5 —	Tel. from Fischman, N.Y.; Tel. to Golub. N.Y.; Dictated letter to Silberberg; Letter to Fischman .....	2.5
5/6 —	Conference Schwartz; Letter to Selvin; Misc. ....	1.5
5/7 —	Misc. ....	1.5
5/10—	Misc. Conference .....	1.5
5/12—	Letter from and letter to Fischman; Misc. ....	1.
	Total carried forward .....	476.3

## Exhibit A—(Continued)

Date	Nature of Service	Time
	Brought forward .....	476.3
5/13—Misc. ....		.5
5/14—Prepared for May 17th hearing .....		1.4
5/17—Court appearance before Judge Harrison; Memo to file; Memo to Selvin ..		4.
5/20—Letter from and letter to November ..		.5
5/21—Telephone to Benedict re Judgment and findings .....		.3
5/24—Letter to Benedict .....		.4
5/26—Received papers from Benedict; Misc. ....		.5
5/27—Tel. to Fischman (allocated); Misc. ..		1.
5/28—Received data from Selvin; Conf. Warne; Tel. from and tel. to Warne ..		3.5
5/31—Conference Warne; Misc. ....		1.
6/1 —Letter to Fischman .....		.5
Total carried forward .....		489.4
10/53 to		
11/53—Research (Paul Selvin) .....		26.
4/14/54 to		
5/27/54—Research by Paul Selvin .....		59.
6/3 —Checked Selvin research; LT Selvin ..		1.
6/7 —Telephone from Selvin .....		.2
6/8 —Conference with Selvin; Telephone to Judge Harrison re Hearing Date ....		.4
6/9 —Studied memoranda and letter from Selvin; Letter to Selvin; Research; Checked transcripts; Prepared outline of affidavits .....		4.

Exhibit A—(Continued)

Date	Nature of Service	Time
6/10—	Letter from and letter to Fischman; Conference C.W. ....	1.5
6/11—	Preparation and dictation of draft of affidavit in opposition to motion to dismiss; Checked transcripts; Misc. ..	3.5
Total carried forward .....		585.5
5/27 to		
6/17—	Research (Paul Selvin) .....	22.
6/14—	Dictated draft of Affidavit, Notices of Hearing, Motion; Letter from Bene- dict; Misc. ....	3.5
6/15—	Dictated draft of Affidavit re Counsel fees, etc., as against RKO .....	4.
6/16—	Studied exhibits, revised affidavit in opposition to motion to dismiss; Dic- tated draft Opening Statement of Memo; Letter from Fischman; Tele- phone from Schwartz .....	6.
6/17—	Revised affidavits; Analyzed Delaware and Nevada papers .....	7.
6/18—	Telephone to and from Selvin; Re- search; Revised Notices .....	1.5
6/21—	Dictated balance of draft of Memo of Points and Authorities; LF Selvin and research .....	6.5
6/22—	Research law library; Dictated Memo re fees against Defendants; Revised;	

## Exhibit A—(Continued)

Date	Nature of Service	Time
	Dictated memo re fees against Plaintiffs .....	10.
6/23—	Revised and checked papers; Telephone from and to Selvin; Misc. ....	4.
	Total .....	648.0
		<u><u>[747]</u></u>

## EXHIBIT B

## Costs Advanced

Date	Amount
1952	
12/15—Filing Complaint .....	\$ 15.00
1953	
2 / 5—Telephone & Telegraph .....	28.51
3 / 2—Telephone & Telegraph .....	21.10
3 / 2—Expenses re New York trip .....	28.96
3 / 4—Marshal re service .....	12.80
3 / 6—Stenographic services .....	12.00
3/11—Marshal re service .....	4.00
5/13—Telephone & Telegraph .....	21.32
6 / 3—Telephone & Telegraph .....	11.25
6/12—Telephone & Telegraph .....	107.11
7/21—Telephone & Telegraph .....	5.19
8/25—Telephone & Telegraph .....	8.63

Date	Amount
9/15—Telephone & Telegraph .....	\$20.65
9/15—Photostating .....	5.50
9/29—Expenses re New York trip .....	100.00
10/14—Transcript .....	8.40
10/14—Postage .....	.90
10/16—Telephone & Telegraph .....	14.88
10/27—Stenographic services .....	25.30
10/29—Transcript .....	32.00
10/30—Telephone & Telegraph .....	28.43
11 / 5—Postage .....	2.68
11/10—Misc. re research, etc. to Paul Selvin	70.00
11/12—Air ticket Las Vegas .....	39.10
11/16—Expenses re Las Vegas trip .....	50.00
11/17—Postage [748] .....	1.00
11/20—Telephone & Telegraph .....	6.00
11/20—Misc. ....	4.95
11/23—Photostating .....	4.61
12/14—Telephone & Telegraph .....	92.23
12/15—Transcript .....	23.10
12/23—Investigation charges re service of process .....	150.00
12/28—Deposition .....	27.50
12/29—Transcript .....	37.70
1954	
1/15—Telephone & Telegraph .....	8.35
1/15—Photostating .....	25.00
1/18—Certified copies of orders, N. Y. ...	2.26
1/18—Transcript .....	7.35
1/26—Expenses re Las Vegas trip .....	50.00

Date	Amount
2 / 2—Postage .....	\$1.96
2 / 2—Telephone & Telegraph .....	9.25
2 / 2—Investigation charges re service of process .....	241.85
2/15—Transcript .....	11.55
2/17—Telephone & Telegraph .....	7.25
3 / 1—Transcript .....	18.90
3 / 8—Postage .....	1.26
3/15—Telephone & Telegraph .....	22.80
4 / 5—Telephone & Telegraph .....	7.07
4 / 9—Telephone & Telegraph .....	4.25
4/21—Postage .....	3.32
4/23—Transcript .....	26.40
5/10—Telephone & Telegraph [749] ....	24.65
6 / 4—Postage .....	.92
6 / 9—Telephone and Telegraph .....	43.46
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Total Disbursements .....	\$1,538.65
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[Endorsed]: Filed June 28, 1954. [750]

[Title of District Court and Cause.]

MINUTES OF THE COURT—JUNE 28, 1954

Present: Hon. Ben Harrison,  
District Judge.

Counsel for Plaintiffs: no appearance.

Counsel for Defendants: no appearance.

Proceedings:

For (1) hearing motion of plaintiffs to vacate in part order docketed and entered Jan. 12, 1954, and for other relief;

(2) hearing application of plaintiffs for leave to take the deposition of Howard R. Hughes;

Pursuant to motion, notice, memo. of points and authorities, and affidavit of Bernard Reich, and notice of intention to apply for deposition of Howard R. Hughes, filed Feb. 4, 1954;

(3) further hearing motion of Bernard Reich, Esq., local attorney of Record for plaintiffs for appointment of a Special Master, pursuant to Rule 53 of FRCP, and pursuant to motion, affidavit of Bernard Reich, filed Nov. 16, 1953, and renote of hearing, filed March 11, 1954;

(4) hearing motion of plaintiffs and the proposed intervenors, Julius November and Eleanor November to add and join parties plaintiff, or for leave to intervene, pursuant to motion, petition, affidavit of Bernard Reich, and memo. of points and authorities, and notice, filed March 11, 1954;

(5) hearing motion of plaintiffs to quash depositions noticed by Louis Kipnis, Léo B. Mittelman, and Robert Silver, Esqs., purported attorneys for plaintiffs, as noticed April 9, 1954, of witnesses, Benj. F. Schwartz, et al., pursuant to notice, motion, affidavit of Bernard Reich, and Memo. of points and authorities, filed April 1, 1954;

(6) hearing motion of defendant RKO Radio Pictures, Inc., for dismissal of this action with prejudice, pursuant to notice, motion, points and authorities, and affidavit, filed April 7, 1954, and order of continuance.

It Is Ordered that cause as to hearing on said motions, etc., is continued to July 12, 1954, 10 a.m.

EDMUND L. SMITH,  
Clerk. [765]

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[Title of District Court and Cause.]

AFFIDAVIT OF LOUIS KIPNIS IN OPPOSITION TO MOTION FOR FEES AND COSTS AS AGAINST PLAINTIFFS; AS AGAINST RKO; AND IN CONNECTION WITH RKO'S MOTION TO DISMISS WITH PREJUDICE

State of New York,  
County of New York—ss.

Louis Kipnis, being duly sworn, deposes and says:

1. I am the attorney for the plaintiffs above named, and their only attorney herein with respect

to whom the conventional relationship of attorney and client exists. Messrs. Mittelman and Silver are associated with me in the above-entitled action.

2. This affidavit is in opposition to the motions herein made by Bernard Reich, Esq., in his own name and in his own behalf, (a) for fees and costs against plaintiffs; (b) for fees and costs against defendants RKO; and (c) in support of the motion made herein by RKO Radio Pictures, Inc., to dismiss the above-entitled action. [766]

3. This affidavit is made by me rather than by the plaintiffs because I am familiar with all the facts involved, whereas the plaintiffs have no personal knowledge of any of the matters set forth in the moving affidavit of Reich except as they have been informed and advised thereof by Mr. Mittelman and me.

4. A long time prior to December 13, 1952, I was retained by plaintiffs, among others, to take the necessary steps to compel Howard R. Hughes, et al., to redress the wrongs allegedly perpetrated by them against RKO and its wholly owned subsidiary, RKO Radio Pictures, Inc. In due course I commenced two actions for appropriate relief in the Supreme Court of the State of New York.

5. While said actions were pending in New York, and because we were unable to obtain jurisdiction of Hughes in New York, we decided, among other things, to commence a similar action in California, or in any other jurisdiction where Hughes resided.

6. Accordingly, on or about December 13, 1952, we requested Bernard Reich, a member of the Bar of this Court, to act as our local counsel in the action about to be commenced in this Court. We advised him that our arrangements with the plaintiffs required us to look for allowances for fees from such courts as had jurisdiction to grant fees, and that under no circumstances were plaintiffs to be obligated therefor. We agreed to pay him 10% of such counsel fees which might be awarded to us for services. We agreed further that in the event services beyond those anticipated from Reich were rendered by him, he might receive such additional compensation as would be determined by a mutual friend, Bernard D. Fischman of New York, who had submitted Reich's name to us. Among other things, he [767] specifically agreed to abide by our policies and by our decisions with respect to the prosecution of the California action.

7. Reich acquiesced to these terms. We mailed him a copy of our complaint in the New York action. He added the necessary jurisdictional paragraphs thereto, and caused the same to be filed in this Court.

8. Shortly thereafter, I met with Mr. Tom Slack, attorney for Hughes, at the home of Mr. Odum at Indio, California. The full and complete history of that meeting has been set forth several times and will not be repeated here. At that meeting Mr. Slack stated that Mr. Hughes was a resident of the State of Nevada and that he was perfectly willing

to meet the issues raised by plaintiffs in that jurisdiction. He also stated that plaintiffs were free to sue in any state, including California, but that Mr. Hughes would contest jurisdiction if the action were prosecuted in any other state than Nevada. All the parties conceded that it was advisable that the issues be determined judicially and not in the newspapers and that procedural delays be avoided in order to prevent grave injury to RKO and its stockholders.

9. We examined into the facts as to Mr. Hughes' residence in Nevada, and into the advantages and disadvantages of proceedings in the Nevada Courts, and we concluded that it would be to the best interests of RKO and its stockholders to bring an action in the State Court of Nevada which had adopted the Federal Rules of Procedure effective January 1, 1953. We convinced ourselves that Mr. Hughes could successfully establish his residence in Nevada, and could successfully oppose any attempt to establish his residence in California. Moreover, it was our opinion that it [768] would be time-consuming and expensive to attempt to establish residence in California. So far as we were concerned it mattered not at all where we tried the issues so long as we could avoid tedious and expensive dilatory tactics. We had no doubt whatever of the integrity of the Nevada Court. We retained David Zenoff of the Nevada Bar to institute the action.

10. We concededly made the decision to institute the Nevada action without consulting Mr. Reich

or anyone else but our clients. The institution of the suit received immediate publicity and aroused also the ire and wrath of Mr. Reich who, apparently, saw vanishing from his grasp that which he had planned to take for himself, to wit, control of this action under the belief that this case would necessarily be tried in this Court, in consequence of which he would expect somewhat more than 10%.

11. Upon being advised of the commencement of the Nevada action, Reich first attempted to persuade us that our judgment was bad. He importuned us to make use of allegedly important factual information which he alone allegedly possessed. He pleaded to be named as co-counsel in the Nevada action so that he could examine Hughes in pre-trial hearings. He suggested a relationship with Floyd Odlum that could be most helpful. He intimated that the Nevada action could be misconstrued. He suggested that we might be charged with fraud and collusion. He insisted on attempting to establish that Hughes was a resident of California rather than Nevada for no other reason than that it would possibly establish control of the case in his hands with possible consequent financial benefits to himself. To that end he consistently violated instructions from us on the spurious ground that he was protecting the interests of the stockholders as a class. [769]

12. Reich became a problem child. We were besieged by long-distance calls without number. He sought the intervention of our mutual friend, Ber-

nard D. Fischman of the New York bar who had recommended him. The situation became intolerable. Finally, when Reich himself had suggested that he would prefer to retire in order to carry on himself on behalf of other stockholders, we agreed thereto, and, in desperation, offered to release him from all obligations to us. In addition, we agreed that our agreement to pay him 10% of our fees would survive his substitution, even though we would have to compensate the new and substituted counsel. We had by now become convinced that Reich's emotional instability was such that if financial sacrifice on our part could disengage us from him then we would make it (and we did).

13. By reason of his suggestion that we arrange to substitute him, we retained the late Henry Herzbrun. Stipulations of substitution were prepared. Reich changed his mind. He no longer wished to be substituted out of the case. It became necessary to discharge him; and, of course, under the circumstances it was our position that he had forfeited all right to compensation under our agreement.

14. In the meantime, we were preparing for trial in Nevada. We were taking depositions of numerous witnesses and marking for identification hundreds of voluminous documents.

15. Reich, as this Court well knows, thereafter made overt his previously suggested charges of fraud and collusion in the very case in which he asked us to name him as co-counsel. He even sought to

enter the Nevada action by the back door, stimulating and triggering and paying the expenses of a proposed intervenor (the Novembers—his present clients here) in the Nevada action. He even demands compensation at [770] \$50 an hour from plaintiffs for these efforts. (See "Time Sheet," page 14, line 19, and "Expense Sheet," page 1, line 30.) He also reached out to New York, and inspired the same charges of fraud and collusion in the courts of New York.

16. As we were readying ourselves for trial, Mr. Hughes took the unusual step of offering to buy up all the assets of RKO including the claims against him. The making of the offer came as a complete surprise to us, but we did not doubt for a moment that the proposed purchase price included a substantial amount attributable to the claims set forth in plaintiffs' two causes of action in Nevada, the only court wherein jurisdiction had been obtained over Hughes and the other defendants.

17. Thereafter, Hughes moved to have the Nevada suit dismissed with prejudice. Upon analysis of consequences of the Hughes offer, we requested the plaintiffs to cross-move for reimbursement of counsel fees for us and for the accountants' fees and of disbursements. This was done.

18. Bernard Reich was then advised by us as follows:

“March 8, 1954.

“Registered Mail

“Bernard Reich, Esq.

“328 South Beverly Drive

“Beverly Hills, California

“Re: Castleman v. Hughes

“Dear Sir:

“Please be advised that there has been circulated by RKO Pictures Corporation a proxy statement, a notice of special meeting of stockholders, a letter from the president, all dated February 28, 1954, and a notice of court hearing.

“In connection with the notice of court hearing, we have served a cross-motion, in [771] substance, for an order to reimburse my clients for counsel and accountants' fees and expenses.

“Reimbursement for said counsel and accountants' fees encompasses wholly and solely the services rendered by Mr. Mittelman and myself and others here in New York and by David Zenoff, Esq., of the Nevada Bar.

“There has not been nor will there be any claim made by my clients, or by us, for reimbursement of counsel and accountants' fees or expenses for anyone other than the persons above mentioned and specifically excludes any claim for services allegedly rendered by you. If you believe that your alleged services are compensable, we suggest that you assert so on March 22, 1954, at 10 a.m. before

Judge McNamee of the Eighth Judicial District Court of the State of Nevada, at Las Vegas, Nevada, specifying the scope, nature, extent and value of the same, if any.

“Please be further advised that the acts, transactions, court proceedings and communications, both oral and written, by you, to the press and to others, will be relied upon by us and our clients to resist the payment to you of any sum of money for your alleged services in the above-entitled case or elsewhere.

“We are not unmindful of the position taken by you before Judge Harrison that you claim that you are entitled to compensation on the basis of quantum meruit and this communication is not to be construed as a concurrence by us that such position is valid or tenable.

“Very truly yours.” [772]

19. Bernard Reich deliberately and wilfully failed to appear in the Nevada Court to establish whatever claim to fees he felt himself entitled to for alleged services rendered.

20. Plaintiffs, we repeat, never contracted to pay Bernard Reich any fees, and such fees, if he were entitled to any, were forfeited by his misconduct and disloyalty as heretofore alleged and realleged.

21. There is no fund before this Court out of which fees could be ordered to be paid, and plaintiffs could not, as a matter of law, seek reimburse-

ment for counsel fees and expenses in this Court on behalf of Bernard Reich or anyone else.

22. Bernard Reich was discharged as attorney for plaintiffs for cause. He failed and refused to follow instructions. He was obstructive. He sought to take over the case. He wrongfully accused us of fraud and collusion. He undertook to take actions and procedures contrary to our instructions, and without the approval of our clients. He showed himself unfit to participate in the case by reason of temperament and disposition. In addition, and, finally, he was unfaithful to his retainer. Mr. Reich was discharged on or about May 7, 1953. Before and after that date he was guilty of all of the charges levelled against him by us in this affidavit, and documented in our earlier affidavits.

23. We appreciate the distasteful duty which has been thrust upon this Court. Though we believe that Reich was justifiably discharged by us, we at all times offered to negotiate, arbitrate or litigate the question of compensation, if any, to Reich. For example, when this Honorable Court stated on October 19, 1953, at page 38 of the transcript for that date: [773]

“I think there should be an adjustment made if you want to dispose of Mr. Reich in this case. It seems to me this Court shouldn't be called upon to settle the internal quarrels. I don't think they bring any credit to the Bar to

have counsel in court fighting over attorney fees. \* \* \*,’’

we accepted the suggestion.

24. In all seriousness and good faith, we attempted to follow the Court’s suggestion and in that regard took the first step in an attempt to negotiate. This Court will recall that in an affidavit filed on November 25, 1953, in opposition to the appointment of a Special Master herein, we incorporated a letter which was written by Robert Silver, Esq., consistent with this Court’s suggestion, and we included therein Reich’s reply thereto. Reich, in short, refused to cooperate in this regard. Indeed, he wrote a letter to our mutual friend, Mr. Fischman, with regard to the matter. A portion of said letter was read to Mr. Mittelman with Reich’s knowledge and consent, as Mr. Mittelman was informed by Mr. Fischman. It is as follows:

“Mittelman apparently had Silver, Herzbrun’s successor, contact me regarding a settlement of our differences. Silver asked me for an itemized statement of my expenses and a bill of particulars regarding my fees. I have refused it on two occasions.” (Emphasis ours.)

It is fairly obvious that Reich did not wish to adjust with us. He still believed, apparently, and as his subsequent acts showed, that he could force his way into control of the case. [774]

25. Next we thought that we might be able to arbitrate and again we tried to cooperate in that

direction and again we were rebuffed. This time the rebuff did not follow the prior pattern. Instead Reich proposed preconditions of such a nature (virtually a veto power over the course of this litigation) that he knew in advance, when he stated them, that his counterproposal to arbitrate would be unacceptable. We find Reich threatening to file affidavits accusing us of fraud and collusion unless we capitulate to his demands. Reich, in a letter to Fischman dated September 3, 1953, a part of which Fischman read to us on the telephone, threatened on the eve of the holiest day of our common religious calendar, as follows:

“If Mittelman does not making a binding agreement by Tuesday, September 8, 1953, to arbitrate before you the week of the 21st, I will file my affidavit, Thursday, September 10th.”

26. And, finally, with respect to Reich's refusal to litigate, we refer to the fact that on March 22, 1954, Reich filed a plenary law suit against us and others, including RKO, for one-half million dollars in the United States District Court for the District of Nevada, and caused deponent Kipnis to be served with the summons and complaint therein. Instead of prosecuting whatever cause of action Reich thinks he possesses, he dropped the suit under Rule 41 of the Federal Rules of Civil Procedure. On the basis of these factors, it is respectfully submitted that our statement hereinabove (Paragraph “23”) that Reich heretofore refused to negotiate,

arbitrate or litigate, has been established out of the mouth of Reich himself.

The only conclusion that can be drawn is that Reich wishes only to agitate and get his name in the papers, [775] as witness his reference in his application for fees from RKO, where he complains of "The almost complete blackout in the newspapers of the proceedings had in this case \* \* \*." (Page 9, line 9).

27. A. It is evident that Bernard Reich is actually attempting to impress on this case now, in advance of the taking of proof and the making of a record, the factual and legal concepts which he would like to have accepted for purposes of the ultimate determination of the issues on the merits. In short, in this purportedly procedural motion, he is in fact seeking substantive determinations of a far-reaching nature—and utterly fallacious ones at that.

B. For example, he makes allegations as though there is no real dispute about them. Whereas, we have indicated time and again that Reich was discharged for cause, he repeats and realleges at every turn that this is a case involving a wrongful discharge and, consequently, that the applicable legal principles entitle him to compensation. Quite the contrary and to make doubly sure of the nature of our position, it is this, that our discharge of Reich was for cause, and that as a consequence he has no right to any compensation whatever.

C. Reich may have a right to contend for the

concepts embodied in his motions, no matter how erroneous or unfounded, and to ask the Court to accept them; but like any other arguments on the merits, these he is entitled to present only following the making of a record in an action brought for specific relief and on the basis of evidence contained therein. It may not properly be accomplished by assertion and argument in a motion of the kind with which we are here confronted. [776]

28. Reich thereby finds himself in a dilemma of his own creation. If his collateral attack on the Nevada judgment is sustainable, then it follows that the case cannot be dismissed, from which it necessarily follows that Reich may not apply for fees, since the case will not have been terminated by judgment or compromise before this Court. On the other hand, if the Nevada judgment receives the full faith and credit to which it is entitled, and since said judgment explicitly finds not only freedom from collusion but that the same was diligently prosecuted and that the stockholders were most adequately represented, and since the Nevada Court had jurisdiction to render full and complete and equitable justice, then Reich is entitled to no compensation. Therefore, by reason of the foregoing, this application for fees by Reich is utterly untenable.

29. In what has been said above, we have set forth the facts justifying the propriety of Reich's discharge, and the facts which lead to the legal conclusion that this Court has no power or jurisdiction

to grant either of Reich's applications for fees. I might also add that in the event this Court grants the defendants' motion to dismiss, then the motion heretofore made by us for a substitution of attorneys becomes moot, and there is no necessity for passing on the same or attaching conditions. Indeed, we respectfully request this Court to permit us to withdraw said motion and we herewith do so move.

30. Among other things, Reich attached to his application for fees a table of hours spent for which he seeks compensation, and an itemized list of expenses for which he seeks reimbursement. We refer to these tables not because we believe this Court has the power or right to consider them in regard to Reich's application for fees [777] (since we contend this Court has no power or jurisdiction to pass upon the same), but because they mirror and reflect obviously non-compensable services, though superficially appearing to constitute efforts in prosecution of the action. Hereinafter, we shall show that the alleged services in question were, in fact, performed in Reich's personal interest, and in opposition to the interests of the action, and in contravention of instructions.

31. In seeking compensation from the plaintiffs, Reich has taken eighteen pages to tell his story. The bulk of the material consists of quotations from self-serving letters which have been controverted by reference to chapter and verse. Since these warmed-over false charges are again submitted, we will not again document the denials but incorporate

those already given, under oath, on an earlier occasion.

32. In Paragraph "20," Page 16, Reich recites that he has had to fight off false charges made by us and that these required his "\* \* \* attention to the minutest detail." "Let's look at the record," and we mean the Reich record (his very own time sheets). Taking the listed "false charges" seriatim, as recited in his affidavit, we find:

(a) Re: the California-Rosenthal intervention. Of this intervention Reich claimed ignorance time and again. In the examination before trial (on December 15, 1953) of Reich, he objected and did not testify to whether he conferred with Mr. Brandlin with reference to the Rosenthal petition to intervene. His own time sheets show contact with Rosenthal's New York lawyer (Gelfand) on September 11, 1953; telephone contact with Rosenthal's California lawyer (Brandlin) between September 16 and 29, 1953; conference with Brandlin on September 30, telephone contact with Brandlin on October 12, 1953; conference with Brandlin [778] on October 13, 1953; telephone contact with Brandlin on October 14, 1953, and again on the 19th; and a conference with Brandlin on the 20th. It is for these hours (of inciting the fighting of the plaintiffs) that Reich wants \$50 an hour.

(b) Re: Schiff and Sack. They were plaintiffs in New York and Delaware actions against Hughes, et al. Reich under oath on December 15, 1953, six months after he was discharged by plaintiffs, tes-

tified before trial that he telegraphed their lawyer, Halperin, from Las Vegas volunteering help. And for this Reich not only wants plaintiffs to pay him \$50 an hour, but to pay for his fare and expenses to Nevada and for the telegram to Halperin.

(c) Re: Charge of self-hospitalization to avoid testifying before Judge McNamee on the fake charge of collusion: On this score Reich is hoist on his own petard. A look at his time sheets for Monday, October 19, 1953, shows "Appearance before Judge Harrison." I was in Court and saw Reich; he was in fine fettle. On Tuesday, the 20th, Reich records charges for which he expects \$50 an hour; on Wednesday, the 21st, more \$50 an hour charges; on Thursday, the 22nd, more \$50 an hour charges; on Friday, the 23rd \$200 worth of charges (i.e. 4 hours). Saturday and Sunday are clear. On Monday, the 26th, more charges and again on Tuesday, the 27th, the hearing day in Nevada, more small charges. Were we not therefore justified in contending that Reich hospitalized himself only to escape from the need to testify? Reich's time sheets and his affidavit thoroughly confirm this most serious charge and simultaneously and just as thoroughly cast serious doubt on the validity of the time sheet and the integrity of its author. Now it may be that Reich was in the Cedars of Lebanon Hospital between October [779] 19, 1953, when he stood before Judge Harrison and October 26, 1953, when he sent the telegram to Judge McNamee saying that he was hospitalized, but it cannot be deduced from

an examination of his affidavits or time sheets. And how disabling an illness could it have been (if illness it was) if Reich was able to and did carry on his affairs?

(d) As to his desire only for a fee: Is there any doubt about this? Reich's motions herein speak for themselves.

33. A. I have analyzed the daily time sheets submitted by Reich wherein he claims that he devoted to this matter a total of 648.0 hours of recorded time between December 13, 1952, and June 23, 1954.

B. It is to be noted that Reich was discharged on May 7, 1953, (though he had expressed a desire to be relieved as early as April, 1953). Between the date of his retainer and the date of his discharge, Reich has only 58.8 recorded hours. The balance of 589.2 recorded hours are entered after his discharge.

C. Of the 58.8 so-called recorded hours before his discharge, at least 5.7 hours seem to be devoted to letters and telephone calls to Fischman who had absolutely nothing to do with the prosecution of this action. At best, Reich seems to have devoted 50 hours to the case before his discharge.

34. It seems to us that following his discharge Reich was an interloper or at best a volunteer who was acting on his own. Yet, if we are to look at the matter realistically, we find ourselves formulating this question: Is Reich entitled to compensation for

fomenting or soliciting interventions in California and Nevada, and for continuing in an action wherein he had been discharged? [780]

25. Let us examine some of the larger charges of time. As the first example:

(a) We find that Reich came to New York between September 16 and September 29, of 1953, and charges 72 hours to plaintiffs at the rate of \$50 an hour. And what did he do in New York according to his record? He conferred with Golub, Fischman, Gelfand and Harry (?). And he had telephone calls with Brandlin, Weisl and Cole.

Golub is the lawyer he sought to retain to bring a law suit against Mittelman and me.

Fischman is the lawyer who introduced Mittelman and me to Reich.

Gelfand is the attorney for the Rosenthals who sought to intervene in this Court and who applied for a fee before Judge McNamee which was denied.

Brandlin is Rosenthals' California lawyer.

Weisl and Cole represent interests connected with Mr. Odum.

But what do any of these activities have to do with the prosecution of the plaintiffs' suit, either before this Court or before Judge McNamee. They were activities calculated to further only the personal interests of Mr. Reich. They were against the interests of plaintiffs. They had for their purpose the taking over of the control of the litigation in

Reich's interests, and for this he seeks to charge plaintiffs. More hours were spent by Reich on this futile personal adventure than were spent by him on the prosecution of the California action prior to his discharge.

(b) We next examine the entry of November 13 to November 15, 1953—"Las Vegas—24 hours." What were these hours devoted to? Reference to the calendar reveals this to be the week end. It was for the purpose of [781] obtaining counsel in Nevada for the Novembers so that they could move to intervene in the Nevada action and against the interest of the plaintiffs. The motion for intervention was dated November 17, 1953, two days after Reich obtained counsel;—and the moving papers?—we already established that they were prepared by Reich! For this Reich desires compensation from plaintiffs at \$50 an hour, or a total of \$1,200.

(c) Let us next examine the entry entitled "10/53 to 11/53 Research (Paul Selvin) 26 hours." It is most interesting. Here we have Reich not only claiming compensation for time at the rate of \$50 an hour for work done by one Selvin, but we also find, from an examination of the disbursement record (11/10/53, Ex. "B," p.1, 1.29) a payment of \$70 to said Selvin—compensation at the rate of something just over \$2.00 per hour. Who is exploiting whom? Not only did Reich not perform the work for which he demands \$50 an hour (or a total of \$1,300) but for that self-same time he paid out a total of \$70, reflecting a gross profit to himself of

\$1,230. And if the same rate of compensation is to be paid to Selvin for the subsequent entries entitled "4/14/54 to 5/27/54—59 hours," Reich stands to profit by an additional \$2,750 since he charges plaintiffs for these hours, devoted by Selvin, also at the rate of \$50 an hour. And if Reich does the same with the item of 5/27 to 6/17 of 1954 (p. 25, 1.3 of Ex. "B") "22 hours," there will accrue an additional profit of over \$1,000.

It would seem that Selvin was employed by Reich to do the so-called research work. (Please see the further entries of 6/21/54 and 6/23/54, p. 25, lines 24-30). That Reich chose to pay Selvin at the rate of less than \$3.00 per hour, while seeking \$50 per hour for himself for [782] such services is significant not because plaintiffs are by any means liable therefor (which they are not), but because it throws light on Mr. Reich's monopolization of all the honesty, decency and integrity in this case.

(d) Further examination of the record after Reich was discharged shows that he spent a great deal of time writing letters to Fischman, to Warne and to a host of persons having no possible connection with the prosecution of plaintiffs' actions in this or any other court. For these pursuits Reich claims a total of approximately 175 hours. It is difficult to be accurate in this regard because Reich frequently bundles his time record with unrelated items as for example: "Court appearance; telephone from Fischman; memo to file—2.5 hours."

But we have done our best, and we believe our approximation is correct.

36. Reich's letters, conferences and telephone calls to Fischman (his friend); to Warne, Golub and Marshall (his advisors); to Schwartz, Brandlin, November, Foley, Gilson, Aleschuler, Nidorf and Halperin (attorneys for other stockholders seeking to intervene); surely is not a basis for compensation. It would be indeed ironic if a client could be charged for services of his attorney even though they are calculated to work against that client's interests.

37. Reich's major activities after his discharge by plaintiffs, according to his time record, were confined to efforts to establish that Mittelman and I had been engaged in fraudulent and collusive activities with the defendants and in endeavoring to mastermind the activities of other stockholders to the end that they would employ him either openly or behind the scenes and carry on parallel litigation, for all of which he now seeks compensation from [783] plaintiffs.

38. We have not the slightest doubt that defendants are capable of contesting Reich's extortionate and unconscionable demands upon them. But we cannot remain silent in the face of certain statements therein made by Reich lest our silence be deemed a tacit admission of the truth thereof.

39. It is important to note and emphasize that Reich, in making his claims against defendants, is acting strictly on his own. He is not authorized by

plaintiffs to demand or request any fees. Plaintiffs have refused and still refuse to apply to any court for fees on his behalf for the reasons above stated. Plaintiffs have been reimbursed by defendants to the full extent of any and all claims for fees and reimbursement of expenses. This is evidenced by way of the satisfied judgment of the Nevada Court.

40. Reich seeks compensation from plaintiffs for the very services for which he seeks compensation from defendants; from plaintiffs, approximately \$40,000, and from defendants, \$1,250,000 (by his calculation in Paragraph "21" of his affidavit).

41. In a compound of deliberate distortion of fact and misstatement of legal principles, Reich seeks in ten pages, which, in turn, incorporates 25 more pages of "daily time sheets," to create an atmosphere of sympathy for himself because of his realization of the nature of the self-created dilemma in which he finds himself. He wants fees and he frankly and obviously does not scruple as to how and from whom to get them.

42. In Paragraph "26," line "26" of Reich's affidavit, he would have this Court believe that the sum of \$12,500 was somehow available to him, implying either that RKO or that we had offered to pay him said sum. This is an utter and deliberate distortion calculated to convey to this Court the idea that [784] we or that RKO offered Reich \$12,500. We never offered any such sum to Reich. As appears above we had tried, but only as a cour-

tesy to this Court, and wholly without prejudice, to arbitrate or negotiate with Reich, but without success.

43. In opposing fees to Reich from plaintiffs we have more fully set forth our position, i.e., we owe him nothing; our clients owe him nothing, and the defendants owe him nothing. This Court has no jurisdiction in the matter, and even if it had, it ought not in the exercise of its discretion entertain the application.

44. In passing, we note that Reich's affidavit is devoid of factual matter showing the rendition of compensable legal services. In clear anticipation of the attack on his "but for"-theory of causation, that is, that "but for" his services there would have been no purchase by Hughes of the assets of RKO, Reich urges a legal theory which reflects the fallacious logical doctrine of "post hoc ergo, propter hoc." (Paragraph "20"). It is no coincidence that four sets of New York law firms also representing minority stockholders are also seeking compensation from RKO on exactly the same "but for"-theory of causation and also because their law suits had not yet been dismissed and they reciprocally give no significance to Reich's services in this lawsuit just as he gives none to them or to their lawsuits. They are mutually and reciprocally correct.

45. A word must be added as to Reich's claim to reimbursement for expenses. On May 19, 1953, at a time when he agreed to retire from the case, Reich claimed in writing to us that his disbursements

amounted to \$143.69. We agreed to pay his disbursements when he itemized them for us. This he refused to do. Now he claims total disbursements of \$1,538.65! We believe that we had a right to know for what [785] we were being charged. The more so because of such charges as follows:

1. 11/12/53—Air ticket to Las Vegas—\$39.50.
2. 11/16/53—Expenses re: Las Vegas trip—\$50.00.
3. 12/23/53—Investigation re: service of process—\$150.00.
4. 1/26/54—Expense re: Las Vegas trip—\$50.00.
5. 2/2/54—Investigation re: service of process—\$241.85.
6. And hundreds of dollars on his long distance calls in furtherance of his own personal purposes.

To demand payment from plaintiffs for expenses which he incurred in opposition to plaintiffs' wishes is just unthinkable.

### Conclusion

We must apologize to the Court for the length of this affidavit. In truth and in fact we simply did not have the time to shorten it. We received the 125 pages of motion papers from Mr. Silver after he received them from Mr. Reich. (We did not receive any papers directly from Reich.) They arrived in New York on Friday, July 1, 1954, on the eve of a three-day National holiday—no part of

which we have been able to celebrate since this affidavit is required to be filed on or before July 7, 1954, in Los Angeles.

Mr. Reich, on the other hand, had notice of the defendants' motion to dismiss back in April, 1954, approximately three months ago. The date for this hearing was first fixed for April 19, 1954, adjourned to June 28, 1954, and then again to July 12, 1954. Characteristically, we believe Mr. Reich waited until the last possible moment to make his [786] cross-motions, and timed the service of his papers to cause maximum inconvenience and harassment to us. If we seem to reflect annoyance and resentment it is because we have been needlessly deprived of the opportunities to be with our families.

I respectfully pray that Reich's motion (a) for fees and costs against plaintiffs be denied; (b) that his motion for costs and fees against RKO be denied, and (c) that RKO's motion to dismiss with prejudice be granted.

/s/ LOUIS KIPNIS.

Sworn to before me, this 6th day of July, 1954.

/s/ LEONARD BRUNNER,

Notary Public, State of New  
York.

Commission expires March 30, 1956.

[Endorsed]: Filed July 7, 1954. [787]

[Title of District Court and Cause.]

AFFIDAVIT OF LOUIS KIPNIS IN OPPOSITION TO PROPOSED INTERVENTION BY JULIUS AND ELEANOR NOVEMBER

State of New York,  
County of New York—ss.

Louis Kipnis, being duly sworn, deposes and says:

1. I am the attorney for the plaintiffs above named, and the only attorney herein with respect to whom the conventional relationship of attorney and client exists. Messrs. Mittelman and Silver are associated with me in the above-entitled action.

2. I incorporate by reference my own affidavit heretofore submitted in opposition to said motion, subscribed and sworn to March 23, 1954.

3. In addition, the attention of this Court is called to the fact that on the hearing held in Nevada on March 23, 1954, the Novembers appeared and were represented by [789] Thomas A. Foley, Esq., of Las Vegas, Nevada, and who appeared according to the transcript of the record, to be the attorney for intervenors Julius and Eleanor November.

4. By reason of their appearance, said proposed intervenors Julius and Eleanor November are bound by the judgment of the Eighth Judicial District Court of the State of Nevada, in and for the

County of Clark, and are consequently barred from intervention into this case.

5. In view of the facts and circumstances set forth herein and in my other affidavit, I respectfully submit that the motion for intervention by Julius and Eleanor November should be denied.

/s/ LOUIS KIPNIS.

Sworn to before me this 6th day of July, 1954.

[Seal]      /s/ AARON SCHWARTZ,  
Notary Public, State of New  
York.

Term expires March 30, 1956.

Affidavit of Service by Mail attached.

[Endorsed]: Filed July 8, 1954. [790]

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[Title of District Court and Cause.]

SUPPLEMENTAL AFFIDAVIT OF  
LOUIS KIPNIS

State of New York,  
County of New York—ss.

Louis Kipnis, being duly sworn, deposes and says:

Following the mailing to Mr. Silver of my main affidavit in opposition to Reich's motions, it occurred to me that I have the solution as to who one of the unidentified conferees with Reich in New York in September, 1953, is. In my main affidavit,

p. 16, para. 25, I identified every person enumerated by Reich except one "Harry." It is my conclusion that Harry is none other than Harry Rosenthal, one of the proposed intervenors in this case. The reason for my conclusion is that the conferees included Gelfand, who is Harry Rosenthal's New York lawyer, and a telephone communication from Brandlin, who is Harry Rosenthal's California lawyer. [792] The other entries on the time sheet would seem to confirm my conclusion that "Harry" is Harry Rosenthal.

The only other item which I wish to clarify appears in my main affidavit on p. 12, l. 24. This Court will recall that the Rosenthal motion for intervention came up for hearing before it on October 19, 1953. Prior to the return day thereof, we caused to be served a cross-motion for multiple relief as follows: (a) staying the Rosenthal motion until their depositions could be taken, (b) enjoining Reich from acting as alleged counsel in the case, (c) substituting Reich, (d) admitting me as lead counsel for plaintiffs, (e) quashing the notice served by Reich to take Mr. Hughes' deposition, and (f) for such relief as is proper in the premises. In my main affidavit, on p. 12, para. 29, I refer to our motion for substitution as though it were a separate and distinct motion. And, I asked leave of this Court to withdraw it since a granting of the motion of RKO would render it moot. In view of the fact that the prayer for relief by way of substituting Reich is but an incident in my

aforesaid cross-motion for multiple relief, I do not wish the impression to remain that I am withdrawing the prayer for the other relief. On the other hand, perhaps in order to avoid any misunderstanding whatsoever, I respectfully ask this Court to disregard the following sentence in my main affidavit: "Indeed, we respectfully request this Court to permit us to withdraw said motion and we herewith do so move." (P. 12, 1. 24.)

In other words, as things stand now, I am not withdrawing my cross-motion of October 19, 1953.

/s/ LOUIS KIPNIS.

Sworn to before me this 6th day of July, 1954.

[Seal]      /s/ AARON SCHWARTZ,

Notary Public, State of New  
York.

Term expires March 30, 1956.

Affidavit of Service by Mail attached.

[Endorsed]: Filed July 8, 1954. [793]

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[Title of District Court and Cause.]

REPLY AFFIDAVIT OF BERNARD REICH

State of California,

County of Los Angeles—ss.

Bernard Reich, being first duly sworn, deposes and says:

1. While attending a conference in San Francisco as a lawyer delegate I was served at my office with the following papers and on the dates indicated:

(a) On July 7, 1954: Supplemental affidavit of Louis Kipnis, dated July 6, 1954; Memorandum of Points and Authorities in Opposition to the fee applications of Reich; also re RKO's Motion to Dismiss, filed by Messrs. Kipnis and Mittelman; Affidavit of Louis Kipnis in Opposition to Proposed Intervention, dated July 6, 1954; Affidavit of Louis Kipnis regarding Motion for Security for Costs, dated July 6, 1954; Reply Memorandum of [795] Points and Authorities in Support of Motion to Dismiss with Prejudice, filed by RKO; Affidavit of Louis Kipnis in Opposition to Motion for Fees and Costs, etc., filed by Messrs. Kipnis and Mittelman, dated July 6, 1954; Memorandum of Points and Authorities of RKO in Opposition to Application of Bernard Reich for Fees from "Defendants Other Than Bank."

(b) On July 6, 1954, there was left at my office Subpoena with command that I bring Items I through XIV, as listed in attached Exhibit A, consisting of five and one-half pages.

2. On my return to the office Saturday, July 10, 1954, I had time only to read the said documents.

3. My papers in opposition to the motion to dismiss and papers in support of my motions returnable July 12, 1954, were served by mail on June 28, 1954, and were received by local counsel for the defendants and purported counsel for the plaintiffs apparently on Tuesday, June 29th, 1954, some fourteen days before the return date of July 12, 1954.

4. Defendant RKO makes no complaint with

respect to the time of service of my papers. On the other hand Mr. Kipnis makes a point that he did not receive the papers from his local counsel here until just before the July 4th week end. In this connection I wrote to local counsel for the defendant RKO, on June 9, 1954, that the proposed date of July 12, 1954, was not convenient to me, although I could be ready if necessary. I sent a copy of the letter to all counsel, including Messrs. Kipnis and Mittelman, but on June 14, 1954, I received a letter from local counsel for the defendant RKO that he was sorry to advise me that counsel on their side was not willing to continue the hearing date and insisted on the July 12th date.

5. I require time within which to answer the various papers which were served on me on July 7th, 1954. Also inasmuch as the [796] Subpoena left at my office indicates that the defendant RKO wishes to take testimony, I too wish to take testimony and of the following persons: Howard R. Hughes, Louis Kipnis, Leo B. Mittelman, Tom Slack, Eli B. Castleman, Marion V. Castleman, Louis Feuerman, and others. Before the hearing at which these persons are made to testify I would like to take their depositions. All of this assumes, however, that this Court intends to hold hearings to take testimony.

6. Even if I had the time to answer the various affidavits of Louis Kipnis, I would be loathe to do so. It has not been my policy in this case to follow Mr. Kipnis in his diversionary tactics. I am certain

this his technique is obvious, that is, "don't deny, attack and raise smokescreens." I intend to fight the fire, not the smoke. Mr. Kipnis' affidavits are essentially false and scurrilous. I have had occasion to answer them before and have denied them, including his charge that I hospitalized myself to avoid appearance before Judge McNamee. This being his most serious charge, I say again that I was not hospitalized, repeat not, on the date of the hearing in Las Vegas; nor did I represent to Judge McNamee that I was. I did not appear in Las Vegas, not because I was ill, but because I did not choose to. I have already stated my reasons for not appearing in Las Vegas.

7. Again I refuse to go down the byways and shady lanes which Mr. Kipnis would have me go down in order to deny point by point his so-called defenses to the allegations I have made. Suffice it to say that I have done what I considered it to have been my duty to do along the lines suggested by the Chief Judge of this Circuit. I stand on my record as an attorney before the courts.

/s/ BERNARD REICH.

Subscribed and sworn to before me this 10th day of July, 1954.

[Seal]      /s/ HELEN SPARKMAN,  
Notary Public in and for the County of Los Angeles, State of California.

Affidavit of Service by Mail attached.

[Endorsed]: Filed July 12, 1954. [797]

[Title of District Court and Cause.]

MINUTES OF THE COURT—JULY 12, 1954

Present: Hon. Ben Harrison,  
District Judge.

Local Counsel for Plaintiff and Proposed  
Intervenors: Bernard Reich.

Counsel for Plaintiffs: Robert Silver.

Counsel for Defendant, RKO Radio Pict.,  
Inc.: Guy Knupp and Roy W. Mc-  
Donald.

Proceedings for Hearing:

(1) Motion of plaintiffs to vacate in part order docketed and entered Jan. 12, 1954, and for other relief;

(2) Application of plaintiffs for leave to take the deposition of Howard R. Hughes; pursuant to motion, notice, memo. of points and authorities, and affidavit of Bernard Reich, and notice of intention to apply for a deposition of Howard R. Hughes, filed Feb. 4, 1954;

(3) Further hearing motion of Bernard Reich, Esq., local attorney of record for the plaintiffs, for appointment of a Special Master, pursuant to Rule 53 of FRCP, and pursuant to motion, affidavit of Bernard Reich, filed Nov. 16, 1953, and renote of hearing, filed March 11, 1954;

(4) Motion of plaintiffs and the proposed intervenors, Julius November and Eleanor November,

to add and join parties plaintiff, or for leave to intervene, pursuant to motion, petition, affidavit of Bernard Reich, and memo. of points and authorities, and notice, filed March 11, 1954;

(5) Motion of plaintiffs to quash depositions noticed by Louis Kipnis, Leo B. Mittelman, and Robert Silver, Esqs., purported attorneys for plaintiffs, as noticed April 9, 1954, of witnesses, Benj. F. Schwartz, et al., pursuant to notice, motion, affidavit of Bernard Reich, and memo. of points and authorities, filed April 15, 1954;

(6) Motion of def't RKO Radio Pictures, Inc., for dismissal of this action, with prejudice, pursuant to notice, motion, points and authorities, and affidavit, filed April 7, 1954, and orders of continuance;

(7) Motion of Bernard Reich, attorney for plaintiffs, filed June 28, 1954, for counsel fees and costs from plaintiffs;

(8) Motion of Bernard Reich, attorney for plaintiffs, and proposed intervenors, filed June 28, 1954, for counsel fees and costs from defendants other than the Chase National Bank.

Attorney McDonald makes a statement, and Attorney Reich makes a statement.

It Is Ordered that cause be submitted on briefs to be filed 7 x 7.

EDMUND L. SMITH,  
Clerk. [799]

[Title of District Court and Cause.]

AFFIDAVIT OF BERNARD REICH

State of California,  
County of Los Angeles—ss.

Bernard Reich, being duly sworn, deposes and says:

1. Since June 23, 1954, the last date on Exhibit A attached to the "Affidavit of Bernard Reich in Support of Motion for Counsel Fees and Costs Against the Defendants," the time expended by my office in this action is set forth in Exhibit "C" attached hereto.

2. Since said Affidavit I have expended the sum of \$11.72.

/s/ BERNARD REICH.

Subscribed and sworn to before me this 16th day of July, 1954.

[Seal] /s/ HELEN SPARKMAN,  
Notary Public in and for the County of Los Angeles, State of California. [800]

## EXHIBIT C

## Daily Time Sheets

Date	Nature of Services	Time
Total carried forward from Exhibit "A" ..		648.0
1954		
6/24—	Checked papers; Misc. ....	2.
6/25—	Telephone to and from Selvin (2); Conference Selvin; Misc. ....	3.
6/28—	Letter from Selvin; Revised papers and filed; Misc. ....	2.5
6/30—	Telephone from Knupp .....	.3
7/10—	Read affidavits, etc.; Subpoena; Dic- tated Reply Affidavit .....	3.
7/12—	Court appearance Judge Harrison....	7.
7/13—	Letter to Selvin; Research; Dictated draft of argument .....	3.5
7/14—	Dictated balance of draft of Argu- ment; Revised draft; Dictated Affi- davit and exhibit .....	2.5
6/23 to		
7/16—	Research by Paul Selvin .....	16.
7/15—	Revised and checked papers re written argument; Received copy of letter from McDonald; Letter to Judge Har- rison; Tel. from Selvin; Misc.....	2.5
7/16—	Tel. from Selvin; Research; Revised and checked papers; Misc.....	2.
Total Time Recorded .....		692.3

[Endorsed]: Filed July 16, 1954. [801]

[Title of District Court and Cause.]

MINUTES OF THE COURT—AUG. 5, 1954

Present: Hon. Ben Harrison,  
District Judge.

Counsel for Plaintiffs: No appearance.

Counsel for Defendants: No appearance.

Proceedings:

The motion of def't RKO Radio Pictures, Inc., to dismiss, heretofore submitted, is ordered granted in accordance with Memorandum of Court filed this day.

Notified local counsel by mailing copy of Memo. of Court to them, as follows:

1. Mitchell, Silberberg & Knupp.
2. Bernard Reich.
3. Robert Silver.
4. Thos. A. Slack.

EDMUND L. SMITH,  
Clerk;

By MURRAY E. WIRE,  
Deputy Clerk. [803]

[Title of District Court and Cause.]

MEMORANDUM GRANTING MOTION  
TO DISMISS

This case is one of several shareholders' derivative actions filed in both state and federal courts throughout the United States involving alleged injury to the same corporation at the hands of the same corporate officers. [For a detailed history of the events giving rise to this litigation see *Schiff v. R.K.O. Pictures Corp.*, 104 A. 2d 267 (1954).]

Defendant R.K.O. Radio Pictures, Inc., has made a motion to dismiss this action with prejudice. The occurrence of two events since the institution of this action compels that this motion be granted.

First, a sale of all of the assets of the corporation on behalf of which this action was brought to the corporate officer who is the alleged principal wrongdoer has been consummated. The terms of the contract of that [804] sale provide that all causes of action held by the corporation against any person including that particular officer are to be a part of the assets sold. The validity of this sale has been upheld by the Delaware Chancery Court. [*Schiff v. RKO*, *supra*.] The effect of that sale is to render this action moot.

Second, that action involving the same issues which are or would be present here instituted in a Nevada state court has gone to judgment on all of these issues. That judgment must be given the effect of *res judicata* by this court.

The motion of local counsel, Bernard Reich, for attorney's fees and costs must be denied. Local counsel was employed to bring this action by New York counsel for plaintiff-shareholders Castleman. Employing counsel has been the recipient of an award of attorney's fees made in the Nevada action heretofore referred to. Local counsel must look to his employer and not to this court for his fee. Even if this were not the case this court could not make an award of fees to local counsel because the Nevada court has held that no counsel representing plaintiffs Castleman in actions pending elsewhere is entitled to any fee other than that allowed by it.

Dated: This 5th day of August, 1954.

/s/ BEN HARRISON,  
Judge.

[Endorsed]: Filed August 5, 1954. [805]

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[Title of District Court and Cause.]

# MINUTES OF THE COURT—SEPT. 1, 1954

Present: Hon. Ben Harrison,  
District Judge.

Counsel for Plaintiffs: No appearance.

Counsel for Defendants: No appearance.

## Proceedings:

It Is Hereby Ordered that this cause be placed on the calendar of Sept. 27, 1954, 10 a.m., for hear-

ing by the Court on the objections to proposed final judgment.

The clerk is directed to notify local counsel.

Mailed notices of said hearing to following counsel:

(1) Bernard Reich, 328 S. Beverly Drive, Beverly Hills, Calif.

(2) Mitchell, Silberberg & Knupp, 6399 Wilshire Blvd., L. A. 48, Calif.

(3) Robert Silver, 139 S. Beverly Dr., Beverly Hills, Calif.

(4) T. A. Slack and Raymond A. Cook, 7000 Romaine, Hollywood, Calif.

EDMUND L. SMITH,

Clerk;

By MURRAY E. WIRE,

Deputy Clerk. [806]

[Title of District Court and Cause.]

MINUTES OF THE COURT—SEPT. 27, 1954

Present: Hon. Ben Harrison,  
District Judge.

Counsel for Plaintiffs: Bernard Reich  
(local counsel for plfs.), Robert Silver  
for plfs.

Counsel for Defendants: Guy Knupp for  
RKO Radio Pictures, Inc.

Proceedings:

For hearing objections to proposed final judgment, pursuant to order fixing date of hearing and notice by clerk 9/1/54.

Attorney Reich makes a statement to the Court in support of allowance of attorneys' fees.

Court makes a statement. Attorney Reich makes a further statement. Attorney Knupp makes a statement. The Court makes a further statement that it will later sign final judgment as presented.

Later, final judgment is signed and ordered filed and entered.

EDMUND L. SMITH,  
Clerk;

By MURRAY E. WIRE,  
Deputy Clerk. [807]

In the District Court of the United States, Southern  
District of California, Central Division

No. 14,848-BH

ELI B. CASTLEMAN, et al.,

Plaintiffs,

vs.

HOWARD R. HUGHES, et al.,

Defendants.

### FINAL JUDGMENT

On the 12th day of July, 1954, came on to be heard:

A. The motion of the defendants, RKO Radio Pictures, Inc., to dismiss this action, with prejudice.

B. The motion of Bernard Reich, Esq., that the Court determine and enter judgment in favor of Bernard Reich, Esq., for attorney's fees and costs against the defendants other than The Chase National Bank.

C. The motion of Bernard Reich, Esq., that the Court determine and enter judgment in favor of Bernard Reich, Esq., for attorney's fees and costs against the plaintiffs Eli B. Castleman, et al. [808]

The movants RKO Radio Pictures, Inc., and Bernard Reich, Esq., appeared generally on such motions on July 12, 1954, and argued the same orally and by written memoranda;

The Court having heard and considered such oral

and written arguments upon the respective motions, and having on the 5th day of August, 1954, filed its memorandum opinion with respect to such motions,

It is Ordered, Adjudged and Decreed that this cause be and the same hereby is dismissed with prejudice.

It is further Ordered, Adjudged and Decreed that each of the aforesaid motions of Bernard Reich, Esq., that this Court enter judgment in his favor for attorney's fees and costs be and the same is hereby denied.

Dated this 27th day of September, 1954.

/s/ BEN HARRISON,  
Judge.

Approved as to Form:

LOUIS KIPNIS, LEO B. MITTELMAN AND  
ROBERT SILVER,

By /s/ ROBERT SILVER,  
Attorneys for Plaintiffs.

DONOVAN, LEISURE,  
NEWTON & IRVINE;

MITCHELL, SILBERBERG &  
KNUPP,

By /s/ GUY KNUPP,  
Attorneys for Defendant,  
RKO Radio Pictures, Inc.

Disapproved as to Form, 8/23/54:

/s/ BERNARD REICH,  
Atty. for Plaintiffs.

[Endorsed]: Filed September 27, 1954.

Docketed and entered September 27, 1954. [809]

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[Title of District Court and Cause.]

### NOTICE OF APPEAL

To the Clerk of the Above-entitled Court:

Notice Is Hereby Given that plaintiffs, Eli B. Castleman, and Marion V. Castleman, doing business as Wolverine Textile Company, and Louis Feuerman, proposed interveners, Julius November and Eleanor November, and Bernard Reich, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the whole and each part of the Final Judgment entered in this action on September 27, 1954.

Dated: October 1, 1954.

/s/ BERNARD REICH,  
Attorney for Plaintiffs, Proposed Intervenors, Julius November and Eleanor November, and in Pro Per.

Affidavit of service by mail attached.

[Endorsed]: Filed October 4, 1954. [810]

In the United States District Court, Southern District of California, Central Division

No. 14,848-BH

Honorable Ben Harrison, Judge Presiding.

ELI B. CASTLEMAN and MARION V. CASTLEMAN, Doing Business as WOLVERINE TEXTILE COMPANY, and LOUIS FEUERMAN,

Plaintiffs,

vs.

HOWARD R. HUGHES, RKO PICTURES CORPORATION, RKO RADIO PICTURES, INC., and THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK,

Defendants.

REPORTER'S TRANSCRIPT OF  
PROCEEDINGS

Monday, October 5, 1953

Appearances:

For the Plaintiffs:

BERNARD REICH, ESQ.,

LOUIS KIPNIS and

LEO B. MITTELMAN; By

BERNARD REICH, ESQ.

HERBERT HERZBRUN, ESQ.

For Defendant RKO Radio Pictures Corp.:

MITCHELL, SILBERBERG & KNUPP,  
and

DONOVAN, LEISURE, NEWTON &  
IRVINE, By  
GUY KNUPP, ESQ.

RAYMOND A. COOK,  
Appearing Amicus Curiae.

Monday, October 5, 1953, 10:00 A. M.

The Court: You may proceed.

The Clerk: Castleman vs. Howard R. Hughes.

Motion of plaintiff to vacate order.

Mr. Reich: Ready for the moving party.

The Court: I will hear you.

Mr. Reich: Now?

The Court: Yes, now.

Mr. Reich: Is this with reference to the motion for amicus curiae?

The Court: The whole thing.

Mr. Reich: All right.

Mr. Cook: If the court please, I have this motion pending with reference to appearing as amicus curiae but I think until the court grants that or rejects it I have no standing to appear on the merits of the motion. I will be glad to explain to the court why I am appearing in this fashion.

The Court: You are sure you are not invading the jurisdiction of the court?

Mr. Cook: No. It is only this, that Mr. Reich does not question the fact that this action has been

dismissed properly in all respects as to the defendant Hughes.

Mr. Reich: I do dispute that very much.

Mr. Cook: All right.

The Court: Counsel, just a moment. I understood that the motion to dismiss as to Hughes there was no question about.

Mr. Reich: There is a question about it. I am moving to vacate the order of June 26, 1953, which includes, your Honor, the dismissal against Hughes.

The Court: Let us get things straight. I am not going to dismiss as to Hughes as to that date. It seems to me that your motion as to the others, those that were dismissed, I think inadvertently, should be vacated but I don't think it should be dismissed as to Hughes. You had proper notice of that.

Mr. Reich: There was no dismissal of Hughes. I direct your Honor's attention to the order——

Mr. Cook: Again if I may interject this, assuming that Mr. Hughes is not in this cause presently I know of no way I can appear before the court except as a friend of the court and of course I am not privileged to do that without moving the court and——

The Court: I think the court will be able to take care of itself, counsel.

Mr. Reich: On the point that your Honor raised, I am now reading from the order of June 26:

“On the 8th day of June, 1953, came on to [3\*] be heard the motion of the defendant, Howard R.

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\*Page numbering appearing at top of page of original Reporter's Transcript of Record.

Hughes, to dismiss the action, or in lieu thereof to quash the return of service of summons; and it appearing to the court by uncontraverted affidavit that the defendant, Howard R. Hughes, became a resident of the State of Nevada long prior to the period material hereto."

I note there is no time in that order and your Honor still doesn't know from any of the papers in this case when Mr. Hughes removed himself from the jurisdiction of this court.

"It is therefore ordered and decreed that the return of service of summons as to the defendant, Howard R. Hughes, be and the same is hereby quashed."

That is not a dismissal of the action against Mr. Hughes. The order goes on:

"It further appearing to the court by the record in this action that there is another action pending in the State of Nevada in which the same plaintiffs herein are the plaintiffs, and in which additional necessary defendants are joined, with all parties properly before the court; that such action is being actively prosecuted before that court; and that the relevant Nevada rules of civil procedure are identical with the Federal Rules of Civil [4] procedure governing actions of this type."

And there is no allegation that this action in California was filed before the Nevada action, your Honor.

"It is, accordingly, further ordered and decreed that this action be, and the same is hereby dismissed without prejudice, the taxable costs of court

exclusive of attorneys' fees to be adjudged against the plaintiffs in the within action."

So the action was dismissed against Mr. Hughes as distinguished from quashing the service. It was dismissed on the ground that there is a Nevada action pending.

Furthermore I say that the motion——

The Court: Just a moment. You don't need to get so worked up and excited in this court because I know the background of this case. This is just a fight between attorneys for attorney fees and I am not very much interested in it, counsel. I am interested more in the litigation not because attorneys want to get their fingers in the pie.

Mr. Reich: And the order goes on and says "approved as to form" and that is signed by an attorney who is not an attorney of this Bar and who has never even been admitted to practice here for the purpose of this case.

It also bears the name of Herbert Herzbrun who never appeared in this case and who didn't even sign this order and then the rest of the defendants—I am the attorney of [5] record for the plaintiff in this case. There is no other attorney.

The Court: Just a moment. Apparently it wasn't dismissed as to Hughes. The service was quashed and I think I will vacate the order except that part that quashes the service as to the defendant Hughes and then I will let the attorneys fight it out.

Mr. Reich: Well, may I be heard on that point, your Honor?

The Court: No, I don't care to hear from you.

I am rather disgusted with this whole thing. I don't think your part of this case is any credit to the Bar of this court.

Mr. Reich: I ask to be heard on that point, your Honor.

The Court: I don't care to hear you. I will set aside the order, as far as the order of dismissal is concerned, and we will take up the other problems when they come up.

Mr. Reich: Your Honor, your Honor does not want to hear from me on that at all? Your Honor challenged me personally. You said you didn't like my part in this case.

The Court: You know I received a letter from your correspondent in New York saying you didn't have any right in this case and they tried to fire you and they couldn't.

Mr. Reich: Your Honor, you had a part in making these rules in 1944. You made these rules about counsel appearing in a case. May I merely direct your attention to the rule [6] your Honor, and also to the conference of judges that was held in June with regard to this very matter.

The Court: Counsel, I don't care to hear any lecture from you.

Mr. Reich: I don't want to lecture you, your Honor.

The Court: I have made my ruling.

Mr. Reich: Your Honor, there are attorneys present here who have known me for a long time. In open court you have challenged my part in this

case. I think you have cast aspersions on me and I ask the opportunity to speak on the point.

The Court: Well, go hire a hall. I don't care to hear from you. Counsel will prepare the appropriate order.

Mr. Reich: Which counsel?

The Court: You made the motion. I granted the motion.

(The above-entitled matter was concluded.)

[Endorsed]: Filed October 4, 1954. [7]

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[Title of District Court and Cause.]

REPORTER'S TRANSCRIPT OF  
PROCEEDINGS

Monday, October 19, 1953

Appearances:

For the Plaintiffs:

LOUIS KIPNIS, ESQ.,  
BERNARD REICH, ESQ.

For Defendant RKO Radio Pictures, Inc.:

MITCHELL, SILBERBERG & KNUPP,  
By GUY KNUPP, ESQ.

For Appellants for Intervention:

J. J. BRANDLIN, ESQ.

\* \* \*

The Court: May I say just a word? Counsel has done a lot of talking on both sides in this case, but as far as this court is concerned it is going to put this case to [12] sleep until the Nevada case is determined.

I am not going to hear it and I am not going to do anything with it that I don't have to do.

This case is pending in Nevada and I understand it is at issue over there. They are taking depositions and they are getting ready for trial. I know Judge McNamee. He is a very able man and a very scholarly man and I think as long as they have started through the wringer over there and that court has jurisdiction of the parties, I am not going to bother with this mess.

You can fire him or not, or he can just sit here and wait. If I don't die or old age first maybe he will.

Mr. Kipnis: There is only one thing that is troubling me, your Honor.

Mr. Reich: Me or Judge McNamee?

The Court: You.

Mr. Kipnis: Mr. Reich is worried and concerned about the stockholders. It is going to cost a heck of a lot of money——

The Court: Counsel, I am not worrying about the stockholders. I have recognized and I have stated before that the whole group of you are interested only in lawyers fees and that is all you are interested in, and to win your case.

You are going to get attorney fees but if any attorney fees are fixed in this court they are going to be mighty [13] small if I ever get around to fixing attorney fees. You will wish that you had never hit this court, any of you, because I think that if there is any recovery that comes through this court the stockholders are going to get the benefit of it because I feel this case is primarily a lawyer's case all the way through. And I think the entire group is interested only in attorney fees. You are more interested in attorney fees than you are in the stockholders, who are scattered all over the country I suppose.

I don't know how many shares of stock Castleman owns in this case——

Mr. Kipnis: 2500.

The Court: A pretty good investment.

Mr. Reich: May I address the court for just a few minutes? I promise to be very brief.

The Court: Yes. It doesn't do any good to get into an argument with you.

Mr. Reich: I will stipulate that my fees may be small. I will stipulate you don't have to fix fees at all.

The Court: You don't have to so stipulate.

Mr. Reich: Your Honor, it is important that my position be stated.

The Court: I think I understand your position. And I think if they want to fire you out of the case they should pay you for what services you have rendered. If they won't [14] let you finish your contract I think like anything else, you should be paid

a reasonable fee for your services. But I would dislike very much to be holding onto a case when the client wants to fire me.

Mr. Reich: Assume that you are practicing law instead of occupying the bench and assume——

The Court: If I had been practicing law this case wouldn't have been here.

Mr. Reich: Well, your Honor, if you had information that I have—assuming that you had certain information which led you to believe that the stockholders weren't being properly represented wouldn't you feel it was your duty to the court to apprise the court after you had tried to have an understanding with counsel on the other side so that he does represent the clients.

I haven't come to this court. I have been brought into this court. This action was dismissed, your Honor, without my knowledge. Certainly you would have felt the duty as a lawyer as I did to set the record straight—that you had nothing to do with that, particularly if you felt that the roof may fall on top of these plaintiffs' attorneys—that the truth may come out and you didn't want to have anything to do with it.

You would have to come to court just as I did, I am sure, your Honor, and move to vacate a dismissal which had [15] been inadvertently obtained without the only local responsible attorney of record even knowing about it.

The Court: I think you lawyers should get together in an arena of your own and fight it out and settle this case between the lawyers as to who is who

in the case without intervention on my part. It is a spectacle to find lawyers fighting among themselves. It doesn't bring any credit upon anybody.

Mr. Reich: Well, your Honor, what would you do about it? What could I do about it? You advise me and I will do it. I just want to do what is right. You tell me what to do and I will do it.

The Court: I am not telling you what to do. [16]

\* \* \*

The Court: I know what counsel has brought up. I still stand by my assertion that this is a lawyer's fight. I pity the stockholders if there is any recovery. I wish I had the fixing of the fees. If I did I know no one would want to try the case in my court because I would certainly see that [33] the stockholders got whatever recovery there is. But I wouldn't have very much to go on. There is nothing here to indicate that the stockholders are worrying a great deal. Not nearly as much as the lawyers.

You say that trial commences January 4th?

Mr. Kipnis: Yes.

The Court: I will continue this to December 28th and I wish to state that I shall probably continue it from time to time until the Nevada case is completed.

Mr. Kipnis: May I make a request about the time? I am not going to argue again. I merely want to make a request with reference to that date, your Honor. That happens to be my birthday and my daughter's birthday—they are all within that time. I have a sick mother at home and I would like to

get back there. As I say it is my daughter's birthday and it is my birthday and it is because of that that I ask you to fix some other time.

The Court: Counsel, it will not be necessary for you to be present. I will not do anything on that date. I am simply going to continue the case from time to time until the Nevada case is completed.

Mr. Kipnis: Well, we are faced with this problem. Mr. Reich is serving notice that he is the attorney——

Mr. Reich: Why are you concerned with the corporation?

Mr. Kipnis: If your Honor will ask me a question I will [34] be delighted to answer it.

The Court: I don't see why you have to worry about it. The California Bar is pretty well represented in this state and why you have to make a trip from New York to appear here seems to me a waste of money, particularly when I am not going to take any action. I am not going to do anything with this case until the Nevada case has been disposed of.

Mr. Kipnis: And it will be res adjudicate after that case is disposed of.

The Court: The whole thing is continued.

May I say one word? I think that Mr. Reich should be eliminated from the case in accordance with the wishes expressed here and I think there should be some adjustment made between the parties.

I don't think that this court should be called upon to fix any fees for his services. It is apparently a

lawyers' case and if you want to get rid of him I think he should be taken care of.

Mr. Kipnis: If he is entitled to anything.

The Court: Well, he has worked on the case.

Mr. Kipnis: I prepared the papers and all he did was bring them over to the court house. Do you call that work?

The Court: That is worth something.

Mr. Kipnis: And that is all he is going to get, if disloyalty and disruption and disgusting behavior is entitled [35] to compensation.

The Court: If you can't agree on fees I will fix them.

[Endorsed]: Filed October 4, 1954. [36]

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[Title of District Court and Cause.]

REPORTER'S TRANSCRIPT OF  
PROCEEDINGS

Monday, July 12, 1954

Appearances:

For the Plaintiffs:

BERNARD REICH, ESQ.,  
ROBERT SILVER, ESQ.

For the Defendants:

MITCHELL, SILBERBERG & KNUPP,  
By GUY KNUPP, ESQ.  
DONOVAN, LEISURE, NEWTON &  
IRVINE, By  
ROY W. McDONALD, ESQ.

Mr. Reich: May it please the court. I first used that form of address, your Honor, on December 14, 1937, before one of Mr. McDonald's courts, the appellate division, First Department, in New York City, "May it please the court."

That was the day after I took the oath as an attorney in the same department and in the same court.

I took the oath again as an attorney in this court before the late Judge O'Connor. I was in uniform. And before I was permitted to wear the uniform of our country, your Honor, I took still another oath and notwithstanding what I heard the court say this morning, that he thought the action should be dismissed and that no award should be made to me, and that while I did a lot of work I brought this all on myself.

I say to your Honor notwithstanding that and sincerely I feel that I have lived up to those oaths that I took and to the spirit of those oaths.

If I go out of this courtroom defeated and routed, for the moment, I would do the same thing all over again. I think I did and complied in this case with what a lawyer is called upon to do and I want to say this, that in this era of fear and fright and subpoenaing of Supreme Court Justices, perhaps even the next President of the United States, more than ever [8\*] now I think that the courts of this country are the real bulwark of democracy and as I think I have had occasion to say to this court before, I think the United States Supreme Court opens, and some

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\*Page numbering appearing at top of page of original Reporter's Transcript of Record.

of the courts here, open with "God Bless this Honorable Court."

I say it too and I say this knowing also what you said this morning, that I am the real optimist in this courtroom because I have faith in the courts of this country.

I heard the Chief Justice in San Francisco say, your Honor, that the poor and the little people needed advocates and lawyers.

I am one of those little people and I represent little people and what this case stands for to me is the attempt to push little people around, and I thank God that I am an attorney and I can practice before these courts and I can be heard and I can state what I know is going on in this case.

Now, in the ordinary case—the ordinary plaintiff, the ordinary defendant, your Honor, the lawyer for either one of the two has the duty which transcends his particular duty to the particular client to be truthful to the court and to abide by his oath. That is true in any case. It is especially true in a class suit where somebody comes to this court with 2500 shares of stock out of 4,000,000 shares of stock and says: "There is an action which I want to bring, not for myself, for my 2500 shares, but for all the stockholders." [9]

I say that the defendants are responsible to the stockholders for thirty-eight and a half million dollars and I say to the court that that individual stockholder does not represent anybody but the class and that he has the duty of representing that class in good faith.

I cited to the court in what I apologize for, a very voluminous set of papers, what this California court has said about stockholder matters—comparing the stockholders to a guardian ad litem—an officer of the court, as it were, and how much more an officer of the court, your Honor, is the attorney for that guardian ad litem. And let me say one other thing, generally speaking. In view of what I have just said it is not necessary, although I can do it, to prove collusion in a stockholders' suit—that is collusion between the defendants and the plaintiff. It is not necessary to prove a sell-out. All that has been proved is that there was not a truly adversary proceeding; that for self-interest the stockholders who purported to represent all the stockholders did not represent them in fact but laid down on the job.

Now you said this morning a lot of work has been done by Mr. Reich but that I brought it upon myself.

Well, I had thought before this morning that the opinions that you had at the outset of this case you had long voiced and that possibly you could have divested yourself of certain opinions which you expressed earlier in the case. [10]

I am concerned now because it would seem, perhaps, that your Honor has not and I want to place in the record if I may, your Honor, as part of these proceedings being held today, what your Honor stated on Monday, October 15, 1953. This is on page 13, line 24.

This is what you said among other things. I am starting on line 24. You said this—I think it was

perhaps to all counsel—maybe not to me alone or perhaps you were saying it to me. You said:

“You are going to get attorney fees but if any attorney fees are fixed in this court they are going to be mighty small if I ever get around to fixing attorney fees. You will wish you had never hit this court, any of you, because I think that if there is any recovery that comes through this court the stockholders are going to get the benefit of it because I feel this case is primarily a lawyers’ case all the way through.”

And also as part of this record, if your Honor please, on the same date and at page 33 beginning with line 21:

“I know what counsel has brought up. I still stand by my assertion that this is a lawyers’ fight. I pity the stockholders if there is any recovery. I wish I had the fixing of the fees. If I did I know no one would want to try the case in my court [11] because I would certainly see that the stockholders got whatever recovery there is.”

I feel that what your Honor said this morning is absolutely consistent with what you said on October 19, 1953.

I had hoped, your Honor, that by this late date you would have seen that what I was trying to do had nothing to do with a lawyers’ fight as such.

Maybe I was misguided in some way but I thought I owed the court the duty to set forth the facts as I knew them—as Chief Judge Denman thought they should be done in that Independence Coal Mine case.

I say this is not a fight among lawyers except collaterally. It has to be a fight among lawyers if lawyers are going to be participants in the charges that are being made. Obviously lawyers are going to defend themselves in a situation but what I think this case stands for is whether or not the defendants can pick their arena and make the plaintiffs, who represent a small share of stock, do their bidding and then try to hold prior proceedings bound by what was done in Nevada.

Now, there are three principal matters before your Honor today. One is the defendant's motion to dismiss. The other is my motion for fees against [12] RKO.

\* \* \*

But I go further than that, your Honor. I say that in a stockholders suit or in any suit, as a matter of fact, where there is a charge of collusion that charge must be tried.

We will take a divorce case, Williams against North Carolina. Each court has a right to say that the judgment that you obtained out of the state was collusive and therefore we are going to try that issue of collusion.

That is even more the point in a representative stockholders suit when the very rule, 23, was made to make sure there was not collusion.

Now, they have got something there, they think. They say that Judge McNamee found under Rule 23-C that there was no collusion. That ends it. That is like pulling yourself up by your bootstraps.

I charged collusion in this court. I have evidence of the collusion. I have put it in affidavit form.

I have also shown that there wasn't—if I haven't shown collusion I have at least shown, let us put it that way, that there was no truly adversary proceeding in Nevada. The plaintiffs were not trying their best. They were interested in whitewashing Mr. Hughes.

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[Endorsed]: Filed October 4, 1954. [19]

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[Title of District Court and Cause.]

### CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 817, inclusive, contain the original Complaint; Amended Complaint; Motion to Dismiss the Action or Quash Return of Service of Summons of Howard R. Hughes with Affidavit in Support; Motion for Security for Expenses of RKO Radio Pictures, Inc., with Affidavit in Support; Stipulation and Order; Order Quashing Return of Service of Summons on Howard R. Hughes and Dismissing Action; Motion to Vacate Order of Dismissal; Affidavit of Bernard Reich in Support of Motion to Vacate Order of Dismissal; Motion to Appeal as Amicus Curiae of Raymond A. Cook with Affidavit in Support; Affidavit of Louis Kipnis, et al., in Op-

position to Motion to Vacate Order of Dismissal; Affidavit of Roy W. McDonald; Affidavit of Bernard Reich in Opposition to Motion and Affidavit of Raymond A. Cook as Amicus Curiae; Affidavit of Bernard Reich in Reply to Affidavit of Louis Kipnis, et al.; Affidavit of Bernard Reich in Reply to Affidavit of Roy W. McDonald; Motion of RKO Radio Pictures, Inc., for Order Dismissing the Action or to Stay All Proceedings, etc., with Affidavits in Support and Copies of Documents in Case No. 59422 in the District Court of the State of Nevada; Cross-Motion and Motion for Certain Relief, etc.; Reasons and Memorandum in Opposition to Notice of Cross-Motion for Certain Relief by Henry Herzbrun, et al.; Affidavit of Leo B. Mittelman in Opposition to Application for Intervention and in Support of Motions; Affidavit of Bernard Reich in Reply to Affidavit of Leo B. Mittelman re Intervention and Cross-Motions; Motion for Appointment of Special Master Pursuant to Rule 53, etc., with Affidavit in Support; Affidavit of Louis Kipnis in Opposition to Motion for the Appointment of a Special Master Under Rule 53, etc.; Affidavit of Bernard Reich in Reply to Affidavit of Louis Kipnis; Order Vacating Order of Dismissal of Action, Plaintiffs' Proposed (not signed); Order Vacating Order Dismissing Action; Motion to Vacate in Part Order Entered January 12, 1954, and for Other Relief with Affidavit in Support; Notice of Intention to Apply for Deposition of Howard R. Hughes; Affidavit of Louis Kipnis; Reply of Defendant Howard R. Hughes to Plaintiffs' Motion to Vacate; Re-

notice of Motion for Appointment of Special Master; Motion to Add and Join Parties Plaintiff or for Leave to Intervene of Julius November, et al., with Notice, Petition and Affidavit in Support; Affidavit of Louis Kipnis in Opposition to Motion to Add and Join Parties Plaintiff or for Leave to Intervene; Affidavit of Bernard Reich in Support of Motions Returnable March 29, 1954; Motion to Dismiss with Prejudice of RKO Radio Pictures, Inc.; Affidavit of Roy W. McDonald in Support of Motion to Dismiss with Prejudice; Affidavit of Julius November; Affidavit of Louis Kipnis; Affidavit of George Benedict, Jr., in Support of Motion to Dismiss with Prejudice with Copies of Documents in Case No. 59422 in the District Court of the State of Nevada; Second and Third Affidavits of George Benedict, Jr., in Support of Motion to Dismiss with Prejudice with Copies of Documents in Case No. 491 in the Court of Chancery of the State of Delaware; Affidavit of Bernard Reich in Opposition to Motion to Dismiss; Motions of Plaintiffs' Attorney for Counsel Fees and Costs from Plaintiffs and from the Defendants other than Bank with Supporting Affidavits; Notice of Hearing of Motions (2) for Fees and Costs; Affidavit of Louis Kipnis in Opposition to Motion for Fees and Costs as Against Plaintiffs, etc.; Affidavit of Louis Kipnis in Opposition to Proposed Intervention by Julius November, et al.; Supplemental Affidavit of Louis Kipnis; Reply Affidavit of Berndard Reich; Affidavit of Bernard Reich; Memorandum Granting Motion to Dis-

miss; Judgment; Notice of Appeal; and Designation of Record on Appeal and a full, true and correct copy of the Minutes of the Court for February 9, March 2, April 13 and 27, June 8, October 5 and 19, November 30, December 14 and 29, 1953, and January 11, February 15, March 24, April 19, May 17, June 28, July 12, August 5 and September 1 and 27, 1954, which, together with Reporter's Transcript of Proceedings on October 5 and 19, 1953, and July 12, 1954, transmitted herewith, constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to \$4.00 which sum has been paid to me by appellants.

Witness my hand and the seal of said District Court this 29th day of October, A.D. 1954.

[Seal]

EDMUND L. SMITH,  
Clerk;

By /s/ THEODORE HOCKE,  
Chief Deputy.

[Endorsed]: No. 14,573. United States Court of Appeals for the Ninth Circuit. Eli B. Castleman, Marion V. Castleman, Louis Feuerman, Julius November, Eleanor November, and Bernard Reich, Appellants, vs. Howard R. Hughes, RKO Pictures Corporation, RKO Radio Pictures, Inc., The Chase National Bank of the City of New York, Eli B. Castleman, Marion V. Castleman and Louis Feuerman, Appellees. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed November 1, 1954.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the  
Ninth Circuit.

In the United States Court of Appeals  
for the Ninth Circuit

No. 14,573

ELI B. CASTLEMAN and MARION V. CASTLEMAN, Doing Business as WOLVERINE TEXTILE COMPANY, and LOUIS FEUERMAN, JULIUS NOVEMBER and ELEANOR NOVEMBER and BERNARD REICH,

Appellants,

vs.

HOWARD R. HUGHES, RKO PICTURES CORPORATION, RKO RADIO PICTURES, INC., and ELI B. CASTLEMAN and MARION V. CASTLEMAN, Doing Business as WOLVERINE TEXTILE COMPANY, and LOUIS FEUERMAN,

Appellees.

### APPELLANT'S STATEMENT OF POINTS

To the Clerk of the Above-Entitled Court, the Appellees and Their Attorneys:

#### Prefatory Statement

Appellants have designated the portions of the record for printing with a view to curtailing what otherwise would prove to be a most cumbersome record.

Anything which does not relate directly to appellants' points has not been designated. For example,

where appellants' point is that the trial court has not acted on a motion, only the motion and the supporting affidavit has been designated and not the opposing or reply affidavits. For another example, where appellants' motion was granted, no opposing or reply affidavits have been designated, since appellees did not cross-appeal.

Moreover, omissions were impelled by the fact that the papers filed just prior to judgment more or less repeat allegations made in earlier papers.

If, however, appellees designate additional papers for printing (at their expense), appellants respectfully request the privilege of making further designations to round out and complete the record (at the latter's expense).

### Statement of Points

The following is a concise statement of points on which appellants intend to rely on the appeal herein.

#### I.

The trial court erred in granting the motion to dismiss.

#### II.

The trial court erred in denying the motions (2) for counsel fees and costs as against the defendants (other than the bank) and as against the plaintiffs.

#### III.

The trial court erred in impliedly finding and ruling that the final judgment in the Nevada action

was res judicata and compelled dismissal of the action herein.

#### IV.

The trial court erred in impliedly finding and ruling that the Delaware action rendered the action herein moot and compelled its dismissal.

#### V.

The trial court erred in putting motions hereinafter described off calendar, continuing them, and failing eventually to rule on them, when it should have granted them. These motions included:

1. Motion to Vacate in Part Order Entered January 12, 1954.
2. Motion for Appointment of Special Master.
3. Motion for Leave to Take the Deposition of the Defendant Hughes.
4. Motion to Add and Join Parties Plaintiff or for Leave to Intervene.

#### VI.

The trial court erred in that its acts and omissions as claimed in the previous point herein stayed in effect the action below, pending determination of the later filed Nevada action, when a direct and formal stay would have constituted an abuse of discretion.

#### VII.

The trial court erred with respect to its order of January 12, 1954, in that

(a) it did not grant all of plaintiffs' Motion to Vacate Order of Dismissal Made June 26, 1953;

(b) it refused to vacate that part of its order of dismissal made June 26, 1953, which quashed service of process on the defendant Howard R. Hughes; and

(c) it failed to set forth the absence of any appearance in opposition to the said motion to vacate dismissal, or to make other appropriate recitals.

### VIII.

The trial court erred in accepting and considering papers filed by Henry Herzbrun and Robert Silver purportedly acting as attorneys for the plaintiffs without being substituted pursuant to the Local Rules of the trial court.

### IX.

The trial court erred in failing to try appellants' defense of collusion and the absence of a truly adversary proceeding so as to support its implied conclusion of law that the Nevada judgment was res judicata of the issues raised in the within action.

Dated: November 5, 1954.

/s/ BERNARD REICH,

Attorney for Appellants.

[Endorsed]: Filed November 5, 1954.

